TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 271.

HENRY J. LUTCHER AND G. BEDELL MOORE, COMPOSING THE FIRM OF LUTCHER AND MOORE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED AUGUST 18, 1891.

(14,809.)

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1 In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Galveston.

THE UNITED STATES
vs.
H. J. LUTCHER & G. B. MOORE, Composing the Firm of Lutcher & Moore. } Law. No. 1444.

Be it remembered that in the above entitled and numbered cause, lately pending in said court, in which final judgment was rendered at the regular March term, 1891, of said court, to wit, on the 11th day of March, A. D. 1891, the Honorable David E. Bryant, judge of the district court of the United States for the eastern district of Texas, presiding, the following proceedings were had and taken in said court, to wit:

2 *Plaintiff's Original Petition. Filed March 11th*, 1887.

THE UNITED STATES OF AMERICA, }
Eastern District of Texas, in the Fifth Circuit. }

In the Circuit Court of the United States of America for the Eastern District of Texas, Holding Sessions at Galveston, Texas, to the November Term, A. D. 1887.

The petition of the United States of America by J. E. McComb, United States attorney for the eastern district of Texas, hereinafter styled plaintiff, complaining of H. J. Lutcher and G. B. Moore, who reside in Orange county, in the State and eastern district of Texas, and within the jurisdiction of this court, and are hereinafter styled defendants, respectfully represents that the defendants constitute a firm of lumbermen doing a saw-mill and lumber business at Orange, in Orange county, Texas, under the firm name and style of Lutcher & Moore, and were such at the date of the wrongs, torts, injuries, and conversion of plaintiff's goods as hereinafter complained of.

Plaintiff further represents that heretofore, to wit, on the — day of January, A. D. 1881, and on divers days thereafter up to and including the first day of August, A. D. 1882, in Vernon parish, Louisiana, in the New Orleans land dist., in the western judicial district of Louisiana, one Daniel R. Knight and one John A. Lovett,
3 who at that time resided in Almadane, Vernon parish, Louisiana, but whose present residence is to plaintiff unknown, did unlawfully and with force and arms enter upon the lands and premises of plaintiff as described in Exhibit "A," which is hereto attached and made a part of this petition, and did commit thereon divers and sundry wrongs and trespasses, and among other things did cut and fell and carry away and convert to their own use four-

teen hundred and forty-eight pine trees (long leaf), equal to 846 feet of lumber each, board measure, aggregating 1,227,904 feet of lumber, board measure, of the value of one dollar per thousand feet while standing, and of the aggregate value before being cut of $1,227.90; that said trees after being cut were of the value of two dollars per thousand feet, board measure, aggregating the total value when cut on the ground of (82,455.80) twenty-four hundred and fifty-five & $\frac{80}{100}$ dollars, and when delivered at Orange, Texas, in the log, were of the value of six dollars per thousand feet, and of the aggregate value of seven thousand three hundred and sixty-seven & $\frac{47}{100}$ dollars. Plaintiff alleges that said trees were cut and felled and cut into logs of proper length to be manufactured into lumber, and were by said Knight & Lovett or other person or persons to plaintiff unknown transported to Orange, Orange county, Texas, and taken possession of by defendants Lutcher and Moore on or about the first day of September, A. D. 1882, and by them converted into lumber, and when so converted, the lumber aggregating the

4 amount of 1,227,904 feet of lumber of the value of ten dollars per thousand feet and of the aggregate value of twelve thousand two hundred and seventy-nine & $\frac{04}{100}$ dollars, which said trees before being cut were of the value of $1,227.90, & after being cut and before being transported of the value of $2,455.80, and after being delivered to Orange, Texas, were of the aggregate value of $7,367.42 *dollars* before being manufactured into lumber, and after being manufactured into lumber at Orange, Texas, were of the aggregate value of $12,279 & $\frac{04}{100}$, which said trees were before being felled and after and at the time of delivery to said defendants and at the time of being by them converted into lumber and after being so converted into lumber and converted to their use and benefit the property of the United States of America, and said lumber when so manufactured was the property of the United States of America; all of which was well known to said Lutcher & Moore at the time of said conversion, but was nevertheless by said defendants converted to their own use and benefit, to plaintiff's damage in the sum of fifteen thousand ($15,000.00) dollars.

A more specific description of the number and quality of trees, the lumber, premises from which cut, by whom, and when, &c., is hereto attached and made part of this petition and marked Exhibit "A."

Plaintiff alleges that the said Daniel R. Knight and John A. Lovett are reported to be insolvent and live somewhere in the State of Louisiana, and they are not made parties to this suit.

5 Plaintiff alleges that by virtue of the premises the United States of America has just cause of action against the said defendants and each of them; that they and each of them thereby became liable to the plaintiff for the value of said trees and of said lumber.

Wherefore he prays that defendants be cited to answer this petition, and that, upon hearing, plaintiff's have judgment against them, jointly and severally, for the value of said timber after being

manufactured into lumber as above alleged, and for all costs of this suit, with lawful interest from the date of said conversion.

Plaintiff alleges that if said defendants, at the time of the conversion of said trees into lumber by them, did not have notice that said trees were the property of plaintiff then, and in that case, they are liable and bound to pay to plaintiff the value of said timber in logs ready to be manufactured into lumber, at Orange, Orange county, Texas, which was at the rate of six dollars per thousand feet, aggregating 1,227,904 feet, board measure; aggregating the value of seven thousand three hundred and sixty-seven dollars and 42 cents, for which plaintiff sues in the alternative, and for which he prays judgment and for costs and interest and general relief, and as in duty bound will every pray.

J. E. McCOMB,
U. S. Attorney for the Eastern Dist. of Texas.

6 (4—478.)

5. EXHIBIT "A."

Report of Timber Trespass.

The blanks must be filled up strictly as prescribed in the book of instructions under head of "Manner of making report of trespass."

In every instance where names of persons are given the post-office address and residence must also be stated.

1. Name of trespasser: Daniel R. Knight and John A. Lovett; P. O. and residence, Almadane, Vernon parish, La. "Firm name of Knight & Lovett, now dissolved."

2. Land trespassed upon: S. ½ of N. ½ & N. ½ of S. ½, sec. 21, and S. ½ of N. W. ¼ & N. ½ of S. W. ¼, sec. 22, tp. 2, S. rg. 11 W., Vernon parish, New Orleans land dist., western judicial dist. Louisiana.

3. Character of land: Vacant U. S. land; see next page, diagram, for number of trees taken from each 40.

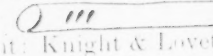
4. Date or dates upon which trespass was committed: During spring, summer, & fall, 1881, & spring, '82. No cutting in '82, but some logs were hauled during that spring.

5. Kind of trespass—cutting or removing or both: Both.

6. Kind of timber: Pine—"long leaf."

7. Number of each kind of trees cut: 1448 trees.

8. Quantity of timber or lumber cut: 1,227,904 ft., b'd measure.

9. Log marks:  Whose property they represent: Knight & Lovett, as above.

10. Location of timber or lumber: Put in Anacoco creek, at and near Slayton's ford, near land trespassed upon; thence to Sabine river; thence to Orange, Texas, and sold to Lutcher & Moore.

11. Value of trees when standing, $1 per M ft.; value of timber on ground where cut, $2 per M ft.; value at stream or shipping point, $4 per M ft.; value in boom at Orange, $6 per M ft.; value at mill, $6 per M ft.; value when manufactured, $10 per M ft.;

value of material in position where and condition when found, $8— per —.

12. Name of present owner, possessor, or claimant of the timber or lumber: —— ——.

(Here follows diagram marked p. 7.)

8 13. Was cutting done under contract? No. Contract price, $8— per ——; where timber was to be delivered, ——; amount advanced or paid on contract, $8—; name of contractors, —— ——.

14. Is the timber sold? Yes. Name of purchasers, H. J. Lutcher & G. B. Moore, of Orange, Texas. Price given or agreed upon, $6 per M; amount paid, $ same; where the timber was delivered, Lutcher & Moore's boom, Orange, Texas; amount of timber delivered, 1,227,904 ft; was the purchase made innocently or with a guilty knowledge? Can't say.

15. Witnesses to trespass and brief of testimony, Edward J. Cain, sec. 33–2 S., 11 W.; P. O. Almadane cut about 300 trees during all of Sept., Oct. & Nov., 1881; principally on island, but some around Smiths' house. John Stephenson, Burkeville, Texas; Lafayette Jackson, Walnut Hill, La., cut at about same time on island & near hill and around Smith's house, and deadening. Henry Dixon, Burr's Ferry P. O., La., and Gus Skinner, Elmwood, Vernon Pa., La., cut at about same time all over the tracts—Jno. R. Smith lives on land—cut about 300 logs. James Kelly, "Old Log camp," Almadane P. O., & Hardy Jordan, Elmwood, La., hauled during fall 1881 & 1882. Emanuel Huddleston, Almadane, La., hauled at same time.

16. Agent's testimony: Divided up land into 40 a. tracts, counted stumps and estimated amount of timber taken; nearly all valuable timber is gone; examination Nov'r 23rd & 24th, 1883.

17. Was the trespass willful? Yes; Knight & Lovett told Smith that they had purchased the land and prevented him ld. 160 acres which he wished to do, also told parties I was making examination; that I was a fool, that they had patents for all this land; this shows a willful trespass.

18. Have any legal proceedings been instituted? No.

19. Are the parties to the trespass financially responsible? Knight & Lovett are not. Lutcher & Moore are worth about $150,000.

20. Action recommended by agent: Criminal suit against Dan'l R. Knight & John A. Lovett, and civil suit against H. J. Lutcher & G. B. Moore for $7,367.42.

21. Remarks: Knight & Lovett sent word to John R. Smith (while I was at work) to be ignorant, &c.

Dated at New Orleans, La., Dec. 3rd, 1883.

CHAS. L. KELSEY,
Special Timber Agent.

If the space allotted under any of the above headings is not sufficient to state the particulars required, state the same on a separate sheet, referring to the number of the question, and attach the same to the report.

[Endorsed:] Ex. A. C. L. No. 1444. ≡5. (4–478.) Report of Chas. L. Kelsey, special timber agent, New Orleans, La., Dec. 3rd, 1883. Timber trespass committed by Daniel R. Knight & John A. Lovett, firm of Knight & Lovett, now dissolved. Timber sold to Lutcher & Moore, Orange, Tex. 1883, 113, 828–1.

9 Indorsements: C. L. 1444. The United States of America *vs.* Lutcher & Moore. Suit for damages, timber taken and converted. Plaintiff's original petition. Filed March 11, 1887. C. Dart, clerk.

GALVESTON, TEX., *March 11th*, 1891.

We, the jury, find a verdict for the plaintiff for thirty-one hundred and fifty $\frac{00}{100}$ dollars, with 8% interest from March 11th, 1887.

P. E. McKENNA, *Foreman.*

10 United States Circuit Court.

The President of the United States of America to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to summon H. J. Lutcher, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next term thereof, to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the seventh day of November next, to answer the petition of The United States of America, filed March 11th, 1887 (number of case, 1444), against him and G. B. Moore in an action for damages for timber taken and converted, of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not and due return of this writ make.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the [SEAL.] circuit court thereof, at Galveston, this 21st day of March, in the year of our Lord eighteen hundred and eighty-seven, and of American Independence the one hundred and 11th year.

C. DART,
Clerk Eastern District of Texas, at Galveston.
By GEO. C. RIVES, *Deputy.*

Received this writ on the 26 day of March, 1887, and I executed the same on the 23 day of April, 1887, by delivering to the within-named defendant, H. J. Lutcher, at Orange, Texas, in person, a true copy of this writ and a copy of the petition, certified by the clerk of this court.

R. B. REAGAN,
U. S. Marshal.

[Endorsed:] C. L. No. 1444. The United States *vs.* Lutcher & Moore. Issued 21st day of March, A. D. 1887. C. Dart, clerk U. S. court, E. D. T., Galveston, by Geo. C. Rives, deputy. Returned and filed April 25, 1887. C. Dart, clerk, by W. L. Hanscom, deputy.

11 United States Circuit Court.

The President of the United States of America to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to summon G. B. Moore, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next term thereof, to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the seventh day of November next, to answer the petition of the United States of America, filed March 11th, 1887 (number of case 1444), against him and H. J. Lutcher in an action for damages for timber taken and converted, of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not and due return of this writ make.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof at Galveston, the 21st day of March, in the year of [SEAL.] our Lord eighteen hundred and eighty-seven, and of American Independence the one hundred and 11th year.

C. DART,
Clerk Eastern District of Texas, at Galveston,
By GEO. C. RIVES, *Deputy.*

Received this writ on the 21 day of March, 1887, and I executed the same on the 25 day of June, 1887, by delivering to the within-named defendant G. B. Moore in person at Galveston, Texas, a true copy of this writ and a copy of the petition, certified by the clerk of this court.

R. B. REAGAN, *Marshal.*
By H. H. KIRKPATRICK, *Deputy.*

[Endorsed:] C. L. No. 1444. The United States *vs.* Lutcher & Moore. Issued 21st day of March, A. D. 1887. C. Dart, clerk U. S. court, E. D. T., Galveston, by Geo. C. Rives, deputy. Returned and filed June 23, 1887. C. Dart, clerk, by W. L. Hunscom, deputy.

12 *Order of Continuance.*

From minutes November term.

NOVEMBER 11TH, 1887.

THE UNITED STATES } 1444.
vs.
H. J. LUTCHER & G. B. MOORE. }

Continued on offer of compromise.

13 *Order from Minutes.*

NOVEMBER 19TH, 1888.

THE UNITED STATES } 1444.
vs.
LUTCHER & MOORE. }

Continued to perfect compromise.

14 *Order of Continuance.*

From minutes March term.

MARCH 30TH, 1889.

THE UNITED STATES } C. L. 1444.
vs.
LUTCHER & MOORE. }

Continued on offer of compromise.

Order Setting Case.

From minutes November term.

NOVEMBER 5TH, 1889.

THE UNITED STATES } C. L. 1444.
vs.
LUTCHER & MOORE. }

Set for Dec'r 16th, 1889.

15 *Defendants' Answer. Filed December 5, 1889.*

U. S. Circuit Court, Eastern District of Texas, at Galveston.

UNITED STATES } No. 1444.
vs.
LUTCHER & MOORE. }

Now into court, by their counsel, come the defendants in the above entitled and numbered cause, and for answer to the allegations of the petition therein filed do specially deny the same and demand strict proof.

They pray that they may have judgment dismissing said petition and for costs and general relief.

By their counsel, J. L. BRADFORD.

Indorsements: No. 1444. U. S. circuit court, east. dist. of Texas, at Galveston. United States *vs.* Lutcher & Moore. Answer of def'ts. Filed Dec'r 5, 1889. C. Dart, clerk, by W. L. Hanscom, deputy.

16 *Notice by Plaintiff to Defendants to Produce Books, &c.*

Filed February 17th, 1890.

United States Circuit Court, Eastern District of Texas, Holding Sessions at Galveston.

THE UNITED STATES } C. L. No. 1444.
vs.
LUTCHER & MOORE. }

To Messrs. H. J. Lutcher and G. B. Moore, composing the firm of Lutcher & Moore, defendants in the above entitled and numbered cause.

SIRS: You are hereby notified to produce before the honorable circuit court of the United States for the eastern district of Texas, at Galveston, upon the trial of the above entitled and numbered case all contracts and lumber and other books showing the purchases of timber by you in 1880, 1881, 1882, 1883, 1884, 1885, 1886, and 1887.

JOSEPH H. WILSON,
U. S. Attorney for Eastern District of Texas.

Indorsements: C. L. 1444. The United States *vs.* Lutcher & Moore. Notice to produce contracts & books. Filed Feb'y 17, 1890. C. Dart, clerk, by W. L. Hanscom, deputy.

17 *Writ to Serve Copy Notice to Produce Books.*

Issued Feb'y 17th, 1890.

UNITED STATES OF AMERICA, }
Eastern District of Texas. }

In United States Circuit Court, at Galveston.

THE UNITED STATES } No. 1444.
vs.
LUTCHER & MOORE. }

The President of the United States to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to serve Mess. Lutcher & Moore with the accompanying certified copy of notice by plaintiff to produce upon the trial of the above entitled and numbered case all contracts and lumber and other books showing the purchases of timber in 1880, 1881, 1882, 1883, 1884, 1885, 1886, & 1887.

Herein fail not and due return of this writ make.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the

United States for the eastern district of Texas, at Galveston, this 17th day of February, A. D. 1890.

C. DART,
Clerk U. S. Circuit Court, E. D. T., G.,
By W. L. HANSCOM, *Deputy.*

[SEAL.]

18 *Marshal's Return on Writ to Serve Copy Notice to Produce Books.*

Received this writ on the 17th day of Feb., 1890, and executed the same on the 26th day of Feb., 1890, by delivering to H. J. Lutcher, of the firm of Lutcher & Moore, in person, at Orange, Texas, in my district, the accompanying copy of notice by plaintiff to produce contracts, books, &c., certified by the clerk of this court.

J. J. DICKERSON,
U. S. Marshal, Eastern District of Texas,
By J. M. WHEELAN, *Deputy.*

Indorsements on writ:

United States circuit court, eastern district of Texas. No. 1444. The United States *v.* Lutcher & Moore. Writ to serve copy. Issued Feb'y 17, 1890. C. Dart, clerk, by W. L. Hanscom, deputy. Returned and filed 4th day of March, 1890. C. Dart, clerk, by W. L. Hanscom, deputy.

19 *Order Setting Case, March 8th, 1890.*

From minutes March term, 1890.

THE UNITED STATES
vs.
H. J. LUTCHER & G. B. MOORE. } C. L. 1444.

Set for March 17th, 1890.

Order of Publication of Depositions.

Entered March 17th, 1890.

From minutes March term, 1890.

THE UNITED STATES
vs.
LUTCHER & MOORE. } C. L. 1444.

On motion of the ass't U. S. att'y, ordered that publication of the testimony in this case be made.

20 *Depositions of Lemuel T. Harvey, Andrew J. McCrainie, and Thomas S. Knight. Filed March 17th, 1890.*

21 UNITED STATES OF AMERICA,
Fifth Circuit and Western District of Louisiana and Parish of Vernon, in said State. } ss:

Be it remembered that on this 20th day of November, in the year A. D. 1889, I, Don E. Sorelle, a notary public in and for the parish of Vernon, State of Louisiana, duly commissioned, qualified, and sworn under the laws of the State of Louisiana and authorized to take depositions for use in the circuit and district courts of the United States under the provision of sections 863 and 864 of the Revised Statutes of the United States, did call and cause to be and personally appear before me, at my office, at the town of Leesville, in the parish of Vernon, in said western district of Louisiana, Andrew J. McCrainie to testify and the truth to say on the part and behalf of the defendants in a certain suit and matter in controversy now depending and undetermined in the circuit court of the United States for the fifth circuit and eastern district of Texas, to be holden at the city of Galveston, in said district, wherein The United States are plaintiffs and Lutcher & Moore are defendants, and numbered 1444 of the docket of said court.

And the said ANDREW J. MCCRAINIE being about the age of 52 years and having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth
22 in the matter of controversy aforesaid, I did carefully examine the said ANDREW J. MCCRAINIE and he did thereupon depose, testify, and say as follows, viz:

1st question by d'f't. Please state your name, age, and residence.

1st answer by witness. My name is A. J. McCrainie, age is 52, and I reside in Vernon parish, La.

2d question by d'f't. This is a suit in which the U. S. Government seeks to recover from Lutcher & Moore for timber cut and removed by Daniel R. Knight and John A. Lovett off the S. ½ of N. ½, N. ½ of S. ½ of sec. 21 and S. ½ of N. W. ¼ and N. ½ of S. W. ¼ of section 22. Now, please state if any of this cutting was done on the S. E. ¼ of N. W. ¼, N. E. ¼ of S. W. ¼ sec. 22, T. 2 S., 11 W.

2nd answer by witness. I know the land involved very well; live near it; witnessed the cutting, hauling, and scaling of the timber in sections 21 and 22, and verily believe that this timber or none of it came from the S. E. ¼ of N. W. ¼ and the N. E. ¼ of S. W. ¼ sec. 22, Tp. 2 S., range 11 W., La. mer., but that it came from lands west of it.

3rd question by d'f't. Please state what is the usual price paid for standing timber in the southwest land district per thousand feet.

3rd ans. of witness. I have never known it to sell for over
23 fifty cents per thousand, and very often it will only bring forty cents per thousand.

4th question by dft. Do you know anything of the manner in which Special Agent Kelsey conducted his examinations in relation to the alleged trespasses on Government lands in this vicinity?

4th answer by witness. I have seen Mr. Kelsey looking about and making investigations, but never saw him use a chain or compass in his work. I saw him stepping off what he said was the middle line running through section 21, tp 2 S., R. 11 W., La. mer., being then at work for the U. S. Government. His examinations were carried on in a careless manner and apparently without system.

5th question by dft. Do you know whether or not timber is sometimes lost in driving after being put into the Sabine river or other streams?

5th ans. of witness. The losses on driving timber from the vicinity of the Anacoco and in the southwest dist. La. generally amount to twenty-five per cent., but in exceptional cases, such as in the severe storms and freshets about the beginning of 1883, the loss was very great, say fifty per cent.

6th question by dft. Do you know of Knight's & Lovett's getting out any timber near the land here alleged to have been trespassed upon?

24 6th answer by witness. In addition to the things just stated I know that Knight & Lovett also got off the 16th section, T. 2 S., 11 W., La. mer., about 300,000 feet, and that this land in the 16th section was at that time, in 1882 and 1883, owned by them.

7th question by dft. Do you know of anything else of interest pertaining to this suit?

7th ans. by witness. I know that Lutcher & Moore in all of their dealings with the people in this locality have repeatedly cautioned the people to be sure that timber they got was taken off private or patented land. I have heard them say this, and believe that they also wrote letters to the people here to the same effect. They were very careful not to deal with trespassers on Government timber.

A. J. McCRAINIE.

Sworn to and subscribed to before me on the day and date above written.

[SEAL.] DON E. SORELLE,
Notary Public.

25 UNITED STATES OF AMERICA, } ss:
Fifth Circuit and Western District of Louisiana, }

I, Don E. Sorelle, a notary public in and for the parish of Vernon, in and for the district aforesaid, duly commissioned, sworn, and qualified, duly authorized under the laws of the State of Louisiana to take depositions under sections 863 and 864 of the Revised Statutes of the United States for use in the circuit and district courts of

the United States, do hereby certify that the reason for taking the foregoing deposition is and the fact is that the testimony of the said witness is material and necessary for the defendants in the cause in the caption of the said deposition named, and that the said witness lives and did live at the time of taking said deposition in the parish of Vernon, in the State of Louisiana, the same being at a greater distance than one hundred miles from the city of Galveston, in the State of Texas, where the court at which it is expected the said cause will be tried was appointed by law to be held, to wit, more than two hundred and fifty miles therefrom.

I do further certify that no notification of the time and place of taking the said deposition signed by me was made out and served on the adverse party or his attorney to be present at the taking of said deposition and to put interrogatories if he might think fit; that the United States, the said adverse party, is represented in
26 said cause by their district attorney, J. E. McComb, who resides and then resided at the city of Galveston, in the State of Texas, more than one hundred miles from the said town of Leesville, in the parish of Vernon and State of Louisiana, the place of caption to the foregoing deposition, being the place where the same was taken.

I further certify that on the 20th day of November, A. D. 1889, I was attended at my office, at the town of Leesville aforesaid, by William H. Wright, att'y for Lutcher & Moore; dffts. (no one appeared for pl'ff), and the witness, Andrew J. McCrainie, who was of sound mind and lawful age, and the witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness and from his statement, and after carefully reading the same to the witness he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition, with my own hand to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named or in anyway interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 20th day of November, A. D. 1889.

[SEAL.] DON E. SORELLE,
Notary Public.

27 UNITED STATES OF AMERICA, }
Fifth Circuit and Western District of Louisiana and } *ss:*
Parish of Vernon, in said State. }

Be it remembered that on this 20th day of November, in the year A. D. 1889, I, Don E. Sorelle, a notary public in and for the parish of Vernon, State of Louisiana, duly commissioned, qualified, and sworn under the laws of the State of Louisiana and authorized to

take depositions for use in the circuit and district courts of the United States under the provisions of sections 863 and 864 of the Revised Statutes of the United States, did call and cause to be and personally appear before me, at my office, at the town of Leesville, in the parish of Vernon, in said western district of Louisiana, Lemuel T. Harvey to testify and the truth to say on the part and behalf of the defendants in a certain suit or matter in controversy now depending and undetermined *in a certain suit or matter in controversy now depending and undetermined* in the circuit court of the United States for the fifth circuit and eastern district of Texas, to be holden at the city of Galveston, in said district, wherein The United States are plaintiffs and Lutcher & Moore are defendants, and numbered 1444 of the docket of said court.

And the said LEMUEL T. HARVEY being about the age of 69 years and having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the
28 matter of controversy aforesaid, I did carefully examine the said LEMUEL T. HARVEY and he did thereupon depose, testify, and say as follows, viz:

[SEAL.]

1st question by dfft. Please state your name, age, and residence.

1st ans. by witness. I am 69 years of age; my name is Lemuel T. Harvey; I reside in Vernon parish, La., in t'p 2 S., R. 10 W., La. mer., and have lived here and in t'p 2 S., R. 11 W., for the last 40 years.

2d question by dfft. Please state the character of the land in and about sections 20, 21, 22, and 23, t'p 2 S., R. 11 W., La. mer.

2d answer of witness. I know that these lands and adjoining lands in t'p 2 S., R. 10 W. and 12 west, have been pretty well cleaned out for a distance of about 2,500 or 3,000 yards from the Anacoco on either side, and that these cuttings date back as far as the year 1861.

3d question by dfft. Do you know anything of Mr. Kelsey's examinations in this locality?

3rd ans. of witness. I have never seen Mr. Kelsey actually engaged in examining the lands, but I know he came out here for that purpose and made his stopping place at my house for two nights. I did not see that he had any compass or chain when he came or left. How he performed his work I can't say, but I have good reason to believe that his examinations and measurements were done in a careless way, by stepping off the land, and I have no
29 doubt, from the careless way in which Mr. Kelsey performed his work upon this occasion, he must have included timber that was cut previous to the time of this alleged trespass and which was cut a good while previous thereto.

4th question by dfft. Are you familiar with the price of standing timber in this locality?

4th answer of witness. The price now received is forty cents per thousand feet; sometimes it brings fifty cents.

5th question by dfft. State if you know *if you know* anything as to timber being lost in driving after having been put in the Sabine river or any other streams.

5th answer of witness. I know that the losses in driving timber down the Sabine is usually twenty-five per cent., and in the severe storms and freshet of 1882 the loss was fifty per cent. all over or more.

6th question by dfft. Do you know or state anything else pertaining to this case?

6th answer of witness. I know that the dfft-, Lutcher & Moore, have been very careful in their dealings with logmen in this neighborhood to caution these people not to take timber off
30 Government land, but in sending them timber to be sure it came off private or patented land, as they wished to avoid the trouble of a lawsuit with the Government.

I have heard nobody spoken to personally, but know these to be facts.

LEMUEL T. HARVEY.

31 UNITED STATES OF AMERICA, } ss:
Fifth Circuit and Western District of Louisiana, }

I, Don E. Sorelle, a notary public in and for the parish of Vernon, in and for the district aforesaid, duly commissioned, sworn, and qualified, duly authorized under the laws of the State of Louisiana to take depositions under sections 863 and 864 of the Revised Statutes of the United States for use in the circuit and district courts of the United States, do hereby certify that the reason for taking the foregoing deposition is and the fact is that the testimony of the said witness is material and necessary for the defendants in the cause in the caption of the said deposition named, and that the said witness lives and did live at the time of taking said deposition in the parish of Vernon, in the State of Louisiana, the same being at a greater distance than one hundred miles from the city of Galveston, in the State of Texas, where the court at which it is expected the said cause will be tried was appointed by law to be held, to wit, more than two hundred and fifty miles therefrom.

I do further certify that no notification of the time and place of taking the said deposition signed by me was made out and served on the adverse party or his attorney to be present at the taking of said deposition and to put interrogatories, if he might think fit; that the United States, the said adverse party, is represented
32 in said cause by their district attorney, J. E. McComb, who resides and then resided at the city of Galveston, in the State of Texas, more than one hundred miles from the said town of Leesville, in the parish of Vernon and State of Louisiana, the place of caption to the foregoing deposition being the place where the same was taken.

I further certify that on the 20th day of November, A. D. 1889, I was attended at my office, at the town of Leesville aforesaid, by William H. Wright, atty for Lutcher & Moore, dffts. (no one ap-

peared for pl'ff), and the witness, Lemuel T. Harvey, who was of sound mind and lawful age, and the witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness and from his statement, and after carefully reading the same to the witness he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition, with my own hand to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named or in any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 20th day of November, A. D. 1889.

[SEAL.]

DON E. SORELLE,
Notary Public.

33 UNITED STATES OF AMERICA,
Fifth Circuit and Western District of Louisiana and Parish of Vernon, in said State, } *ss:*

Be it remembered that on this 20th day of November, in the year A. D. 1889, I, Don E. Sorelle, a notary public in and for the parish of Vernon, State of Louisiana, duly commissioned, qualified, and sworn under the laws of the State of Louisiana and authorized to take depositions for use in the circuit and district courts of the United States under the provisions of sections 863 and 864 of the Revised Statutes of the United States, did call and cause to be and personally appear before me, at my office, at the town of Leesville, in the parish of Vernon, in said western district of Louisiana, Thomas S. Knight to testify and the truth to say on the part and behalf of the defendants in a certain suit or matter in controversy now depending and undetermined in the circuit court of the United States for the fifth circuit and eastern district of Texas, to be holden at the city of Galveston, in said district, wherein The United States are plaintiffs and Lutcher & Moore are defendants, and numbered 1444 of the docket of said court.

And the said THOMAS S. KNIGHT being about the age of 60 years and having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the
34 matter of controversy aforesaid, I did carefully examine the said THOMAS S. KNIGHT and he did thereupon depose, testify, and say as follows, viz:

[SEAL.]

1st question by defendant. Mr. Knight, in this suit, No. 1444, the Government charges Daniel R. Knight and John A. Lovett with

having taken timber in 1881 and 1882 off certain lands in which is included the S. E. of the N. W. and N. E. of S. W. sec. 22, township 2 S., R. 11 W., La. mer. Please state what you know in relation to this matter.

1st answer of witness. I know cuttings have been made on adjoining lands, but don't think these particular tracts were cut on.

2 question by defendant. State your name, age, and residence and how you know the lands involved.

2d answer of witness. Thomas S. Knight; age, 60; live in Vernon parish, La., and know the lands because I live near them.

3rd question by defendant. Is there anything else of interest you know concerning this suit?

3rd ans. of witness. I know of nothing else except that the examinations of Special Agent Kelsey are not entitled to much
35 credit because of the careless manner in which he conducted the same. He used no surveying compass nor had the assistance of competent men, but, on the contrary, his measurements were made by simply stepping off the lands.

4th question by dft. Please state what standing timber is worth in and about the southwest land district of La., and has been since 1880.

4th ans. by witness. Generally fifty cents per thousand, but sometimes only forty cents.

5th question by dft. Do you know anything relating to the loss of timber after it has been put in the Sabine river or any of its tributaries for driving?

5th ans. of witness. Generally the losses on driving to any considerable distance amount to 25%, but on exceptional cases, such as in the case of the severe storm of the year 1882 and 1883, the loss was fifty per cent. all over.

T. S. KNIGHT.

DON E. SORELLE,
Notary Public.

THOS. S. KNIGHT, recalled by dft., deposes and says:

1st question by dft. Do you know if Knight and Lovett got out any timber in 1882 and 1884 from lands near those here alleged to have been trespassed upon?

36 1st answer of witness. I know that besides the timber already mentioned they also got out about that time somewhere near 300,000 feet from the 16th section, T. 2 S., R. 11 W., La. mer., near the land here involved.

2nd question by dft. State anything else you may know relating to this case.

2d ans. by witness. I know that Lutcher & Moore have been careful to have those with whom they dealt take no timber for them off Government land. I have heard them cautioned against trespassing.

T. S. KNIGHT.

Sworn to and subscribed before me on the day and date first above written.

[SEAL.] DON E. SORELLE,
Notary Public.

37 UNITED STATES OF AMERICA, } ss:
Fifth Circuit and Western District of Louisiana,

I, Don E. Sorelle, a notary public in and for the parish of Vernon, in and for the district aforesaid, duly commissioned, sworn, and qualified, duly authorized under the laws of the State of Louisiana to take depositions under sections 863 and 864 of the Revised Statutes of the United States for use in the circuit and district courts of the United States, do hereby certify that the reason for taking the foregoing deposition is and the fact is that the testimony of the said witness is material and necessary for the defendants in the cause in the caption of the said deposition named, and that the said witness lives and did live at the time of taking said deposition in the parish of Vernon, in the State of Louisiana, the same being at a greater distance than one hundred miles from the city of Galveston, in the State of Texas, where the court at which it is expected the said cause will be tried was appointed by law to be held, to wit, more than two hundred and fifty miles therefrom.

I do further certify that no notification of the time and place of taking the said deposition, signed by me, was made out and served on the adverse party or his attorney to be present at the taking of said deposition and to put interrogatories if he might think fit; that the United States, the said adverse party, is represented in said cause by their district attorney, J. E. McComb, who re-
38 sides and then resided at the city of Galveston, in the State of Texas, more than one hundred miles from the said town of Leesville, in the parish of Vernon and State of Louisiana, the place of caption to the foregoing deposition, being the place where the same was taken.

I further certify that on the 20th day of November, A. D. 1889, I was attended at my office, at the town of Leesville aforesaid, by William H. Wright, att'y for Lutcher & Moore, dfts. (no one appeared for pl'ff), and the witness, Thomas S. Knight, who was of sound mind and lawful age, and the witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness and from his statement, and after carefully reading the same to the witness he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition, with my own hand to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named, or in

any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 20th day of November, A. D. 1889.

[SEAL.] DON E. SORELLE,
Notary Public.

39 Indorsements on depositions of L. T. Harvey *et al.:* No. 1444. U. S. circuit court, 5th circuit & east. dist. of Texas. United States *vs.* Lutcher & Moore. Depositions of Lemuel T. Harvey, Andrew J. McCrainie, and Thomas S. Knight. Publication made in open court by order of court at request of M. S. Jones, ass't U. S. att'y, March 17, 1890. C. Dart, clerk. Filed March 17, 1890. C. Dart, clerk.

40 From minutes, March term, 1890.

Order Setting Case.

MARCH 20TH, 1890.

THE UNITED STATES *vs.* LUTCHER & MOORE. } C. L. 1444.

Set for March 31, 1890.

41 *Plaintiff's Motion for Order Requiring Def'ts to Produce Books, Etc. Filed March 24th*, 1890.

U. S. Circuit Court, 5th Circuit and Eastern District of Texas.

THE UNITED STATES *vs* LUTCHER & MOORE. } No. 1444.

Plaintiffs appear by counsel, M. S. Jones, special ass't U. S. att'y, and represent that the production in court of all the books, papers, contracts, and correspondence relating to the timber and saw-mill business of defendants' firm, showing their purchases, receipts, and scaling of timber and their contracts for the cutting and delivery of timber between their said firm and Dan'l R. Knight and Jno. A. Lovett, of Vernon parish, Louisiana, during the years 1881, 1882, & 1883 is necessary to enable plaintiffs to fully make out their case. Appearers represent that said books, papers, and contracts are in the possession of defendants and are pertinent to the issue in this case.

Wherefore plaintiffs pray for an order of court commanding the defendants, Lutcher & Moore, to produce their books, papers, contracts, and correspondence hereinbefore described, in open court, on the 31st day of March, 1890, or on or before the trial of this cause, and that notice hereof and of said order be served on defendants.

MONFORT S. JONES,
Special Assistant U. S. Attorney, Eastern District of Texas.

Indorsements: C. L. No. 1444. The United States *vs.* Lutcher & Moore. Plaintiff's motion for order to produce books, &c. Filed March 24, 1890. C. Dart, clerk, by W. L. Hanscom, deputy.

42 Writ to serve copy. Motion for order requiring def'ts to produce books, &c. Issued March 24th, 1890.

UNITED STATES OF AMERICA, *Eastern District of Texas.*

In United States Circuit Court at Galveston.

THE UNITED STATES *vs.* LUTCHER & MOORE. } No. 1444.

The President of the United States to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to serve the defendants, Lutcher and Moore, with the accompanying certified copy of plaintiff's motion for an order of court requiring defendants to produce in court all books, papers, contracts, and correspondence relating to the timber and saw-mill business of def'ts' firm, showing their purchases, receipts, &c., filed March 24th, 1890.

Herein fail not and due return of this writ make.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 24th day of March, A. D. 1890.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court E. D. T., G.
By W. L. HANSCOM, *Deputy.*

43 *Marshal's Return on Writ to Serve.*

Received this writ on the 24th day of March, 1890, and executed the same on the 27th day of March, 1890, by delivering to G. B. Moore of the firm of Lutcher & Moore, in person, at Orange, Texas, in my district, the accompanying copy of plaintiff's motion for order of court, &c., certified by the clerk of this court.

J. J. DICKERSON,
U. S. Marshal Eastern District of Texas,
By J. M. WHELAN, *Deputy.*

Indorsements on writ to serve:

United States circuit court, eastern district of Texas. No. 1444. United States *v.* Lutcher & Moore. Writ to serve copy. Issued March 24, 1890. C. Dart, clerk, by W. L. Hanscom, deputy. Returned and filed 28th day of March, 1890. C. Dart, clerk, by W. L. Hanscom, deputy.

44 *Depositions of E. J. Cain and Others. Filed April 1, 1890.*

Circuit Court of the United States in the Fifth Circuit and Eastern District of Texas, at Galveston, Texas.

UNITED STATES
vs. No. 1111.
LUTCHER & MOORE.

Montfort S. Jones, being duly sworn, says that he has been duly appointed and has qualified; been commissioned assistant to the United States attorney for the eastern district of Texas, and in his said capacity is the fully authorized attorney — the United States, plaintiffs in the above-entitled cause, for all the purposes thereof, and that he is advised and verily believes that the testimony of E. J. Cain and J. A. Cain, Leesville, Vernon Ph.; Jno. R. Smith, Almadane; Jas. Kelly, Lafayette Jackson, Emanuel Huddleston, all of Almadane, Vernon Ph., and Gus Skinner and Hardy Jordan, of Elmwood, Vernon Ph., and Henry Dickson, of Robeline, Natchitoches Ph., La.; Wm. H. Craft, A. J. McCranie, Silas Fowler, all of Almadane, Vernon Ph., La., and D. R. Knight, of Robeline, Natchitoches Par., La.; and the western district of Louisiana, is material and necessary for the plaintiffs, the United States, in the prosecution of such cause; that said witnesses reside as above stated and in the western district of Louisiana and out of the eastern district of Texas and more than one hundred miles distant from Galveston, in the eastern district of Texas, where the court, at which this deponent expects the said cause will be tried, is appointed by law to be held, and that it is not probable that the presence of
45 said witnesses can be had at the trial of said cause.

And deponent further says that he is informed and believes that H. J. Lutcher and G. B. Moore, the above-named defendants, reside at Orange, Orange Co., in the State and eastern district of Texas, about 150 miles from Alexandria, in the State and western district of Louisiana, the place where the examination of the said witnesses is expected to be taken, and that, as he is also informed and believes, Jas. L. Bradford is the attorney of said defendants and resides at New Orleans, in the State of Louisiana, about 200 miles from Alexandria, as aforesaid.

MONTFORT S. JONES.

Sworn to and subscribed before me, the undersigned authority, this the 25 day of January, A. D. 1890.

J. B. BEATTIE,
[SEAL.] *U. S. Com'r, West. Dist. La.*

Let E. J. Cain, A. J. Cain, Jno. R. Smith, James Kelly, Lafayette Jackson, Emanuel Huddleston, Wm. H. Craft, A. J. McCranie, Silas Fowler, Wm. J. Knight, Gus Skinner, Hardy Jordan, Henry Dixon, and D. R. Knight, the witnesses named in the foregoing affidavit,

be examined *de bene esse* before me accordingly at Alexandria, Louisiana, on the — day of ——, A. D. 1890, at — p. m., and let — days' notice be given to said defendants (or to —— ——, the attorney of said defendants, as either may be nearest) of such examination, provided either defendants or —— ——, said attorney, may
46 live or be found within one hundred miles of Alexandria, said place of examination.

Witness my hand and seal officially this the 25th day of Jan'y, A. D. 1890.

[SEAL.]

J. B. BEATTIE,
U. S. Com'r, W. Dist., La.

U. S. Circuit Court, Galveston.

U. S.
vs.
LUTCHER & MOORE. } No. 1444.

No date was fixed in the order annexed to the affidavit for the taking of test'y in this case, therefore no notices were served.

Witnesses ex.:

Wm. J. Knight, Henry Dixon, Ema-uel Huddleston, Lafayette Jackson, A. G. Skinner, Hardy Jordan, D. R. Knight, Jas. Kelly, J. R. Smith, Edward J. Cain.

47 In the Circuit Court of the United States, at Galveston, in the Fifth Circuit and Eastern District of Texas.

UNITED STATES
vs.
LUTCHER & MOORE. } No. 1444.

SIR: You are hereby notified that E. J. Cain, J. A. Cain, Leesville, La.; John R. Smith, James Kelly, Lafayette Jackson, Emanuel Huddleston, Wm. H. Craft, A. J. McCranie, Silas Fowler, W. J. Knight, Almadane, Vernon Ph., La.; Gus. Skinner, Hardy Jordan, Elmwood, Vernon Ph., La.; Henry Dixon and D. R. Knight, of Robeline, Natchitoches, Ph., La., will be examined *de bene esse* before me at Alexandria, La., on the — day of ——, 1890, at —— as witness for the plaintiff in the above-entitled cause according to the act of Congress in such case made and provided, said witnesses residing in the western district of Louisiana and out of the eastern district of Texas, and more than one hundred miles distant from Galveston, in said district, the place at which the court in which such cause is pending is appointed by law to be held; at which time and place appointed for the examination of said witness you are entitled to be present and to put interrogatories to the same.

J. B. BEATTIE,
U. S. Com'r, W. Dist., La.

To G. B. Moore, above defendant, or J. L. Bradford, attorney for defendants.

48 In the Circuit Court of the United States, at Galveston, in the Fifth Circuit and Eastern District of Texas.

UNITED STATES
vs.
LUTCHER & MOORE. } No. 1444.

SIR: You are hereby notified that E. J. Cain, J. A. Cain, Leesville, Vernon Ph.; Jno. R. Smith, James Kelly, Lafayette Jackson, Emanuel Huddleston, Wm. H. Craft, A. J. McCranie, Silas Fowler, W. J. Knight, all of Almadane, La.; Gus Skinner, Hardy Jordan, Elmwood, Vernon Ph., La.; Henry Dixon, D. R. Knight, Robeline, Natchitoches Ph., La., will be examined *de bene esse* before me, at Alexandria, La., on the — day of ——, 1890, at ——, as witness for the plaintiff in the above-entitled cause, according to the act of Congress in such case made and provided; said witnesses residing in the western district of Louisiana and out of the eastern district of Texas and more than one hundred miles distant from Galveston, in said district, the place at which the court in which such cause is pending is appointed by law to be held; at which time and place appointed for the examination of said witnesses you are entitled to be present and to put interrogatories to the same.

J. B. BEATTIE,
U. S. Com'r, West. Dist., La.

To H. J. Lutcher, above defendant, or J. L. Bradford, attorney for defendants.

49 *E. J. Cain.*

U. S. Circuit Court, 5th Circuit, Eastern Dist., La.

UNITED STATES
vs.
LUTCHER & MOORE. } No. 1444.

EDWARD J. CAIN, sworn and examined on behalf of plaintiff:

In 1881 and 1882 I was living in sec. 33, T. 2 S., R. 11 W. I know the location or metes and bounds of secs. 21 and 22, T. 2 S., R. 11 W. I was at the Almadane store of Knight & Lovett in August, 1881. The first Monday in Sept., 1881, I went to cutting logs. J. A. Lovett hired me to cut logs for the firm of Knight & Lovett—D. R. Knight and J. A. Lovett. Mr. Lovett having hired me to cut the timber, I began cutting timber on the first Monday of Sept., 1881, in sec. 21, about 200 yards in front of John Smith's house. We cut all over sec. 21 for Knight and Lovett. I had one man working with me as a partner for a while. During the time I was cutting there would be as many as 30 or 40 men cutting and hauling on this same land for Knight & Lovett. Myself and partner would cut as many as 40 logs per day. My partner and myself cut for a week, six days; I then cut alone after that $71.00 worth of logs at 50c. per thousand, taking 4 logs to the thousand. I had a

settlement with Mr. Lovett. A part of this cutting was done on the N. ½ of the S. W. ¼ and S. ½ of N. W. ¼, sec. 22. I suppose these men cut there for 2 months. These men would average 7 logs a day. This timber would average 500 feet to the tree. We put this timber in the Anacoco, near where it was cut. The brand on this timber was [illegible]. This timber was cut in 1881 and floated in 1882. The timber that was cut in 1882 was run in 1883.

50 I know the men who floated the timber got back late in the spring both years. Dr. Lovett bossed the run. I helped to run it out of the Anacoco; Dr. Lovett employed me to do it. Knight and Lovett settled with me. I helped them turn the timber out of the Anacoco into the Sabine on its way to Orange. There was fully 2,500 sticks of timber in what they had run out of the Anacoco each season. I know Major Diebrecht; he stopped at my house frequently. He said he was locating lands for Lutcher & Moore. His business was locating lands. He was familiar with all the lands and lines in that section. I never knew of any other logging firm than Knight & Lovett logging on the lands herein described. They claimed all the lands in this country and deterred others from buying by their claim of ownership. I know from Lovett himself of his having sold Gov't lands to other parties—to Harrison Craft for one.

EDWARD J. CAIN.

51 *Henry Dixon.*

United States Circuit Court, Eastern District of Texas.

UNITED STATES } No. 1444.
vs.
LUTCHER & MOORE. }

HENRY DIXON sworn and examined on the behalf of the Government:

About 1881 or '2 I worked about a week for D. R. Knight and John A. Lovett. I had a partner working with me, Steve Huddleston, sawing trees. The timber I cut for Knight & Lovett was on the west side of the Almadane road and between that road and where John R. Smith lives, about half a mile east of Smith's house. We averaged about 25 logs a day. These logs averaged 20 feet in length. They were scaled at four logs to the thousand. We got 50c. per thousand.

his
HENRY x DIXON.
mark.

Attest:
THOS. J. HICKMAN.
MONTFORT S. JONES.

52 *Emanuel Huddleston.*

United States Circuit Court, Eastern District of Texas.

UNITED STATES
vs. } No. 1444.
LUTCHER & MOORE.

EMANUEL HUDDLESTON sworn and examined on behalf of the Gov't:

I live near Almadane, in Vernon parish, La. I had been employed by Knight & Lovett as a teamster, hauling logs for them, for a number of years. Before Knight & Lovett failed I hauled timber for them from the land between John Smith's house and the Knight & Lovett place, known as the Hardy Jordan log camp. I hauled 17 months. I had three yoke of oxen and a cart. I was employed *by* as a teamster by J. A. Lovett and D. R. Knight.

his
EMANUEL x HUDDLESTON.
mark.

Attest:
A. H. BERNSTEIN.
MONTFORT S. JONES.

53 *Lafayette Jackson.*

United States Circuit Court, Eastern District of Texas.

UNITED STATES
vs. } No. 1444.
LUTCHER & MOORE.

LAFAYETTE JACKSON sworn and examined on behalf of the Government:

I live at Almadane, Vernon parish. In 1881, I think, I worked for Knight & Lovett, cutting and scaling logs for them. In 1881 I cut timber about 200 to 100 yards west of John Smith's house, in sec. 21, and also I cut about a quarter of a mile northeast of John Smith's house, on sec. 22, 2 S., 11 W., on a line between Smith's house and the Almadane road. I was at Smith's house after the tresspass was made with Mr. Hickman; the timber agent, who told me what sections the lands he cut on lay, and also showed me his map. I cut west of the house about a week. I had a partner during that time, Ben. Sweatman. I suppose we averaged 20 logs a day, about 10 or 12 trees. We cut northeast of the house about 2 weeks. I had the same partner, Mr. Ben. Sweatman, at the time. We averaged about the same number of logs a day as we did on the other land. It was, I think, in July or August, 1881. I suppose this timber we cut there would average about 450 or 500 feet to the tree. I was employed by Dan'l R. Knight to cut this timber.

Dan'l R. Knight was a member at that time of the firm of Knight & Lovett. When we were paid off Dr. Lovett settled with me, Dr. John A. Lovett. The firm was composed of D. R. Knight and J. A. Lovett. I was not assisted by any one at the time I cut this timber except by my partner, Ben. Sweatman, and a young man
54 by the name of Wilkinson for two or three days. E. J. Cain cut on this same land, but not at the same time I did. There were 5 or 6 other persons cutting on this same land for Knight & Lovett at the time I was cutting there. During the whole time I was cutting there there were other parties cutting there. No other logging firm but that of Knight & Lovett cut any timber there that I know of. This timber that was cut while I was there by myself and other persons was put into the Anacoco creek about from a quarter to a mile from where it was cut. The only market for timber cut there is at Orange, Texas. The running brand for Knight & Lovett was a belt and three hacks. Some two or three weeks after I quit cutting I was employed as scaler by Knight & Lovett and scaled timber cut on these same lands. None of any portion of the timber I scaled was cut by myself. It was all cut by other parties. I scaled for E. J. Cain—that is, I scaled the timber cut for them—also for Silas A. Fowler and Dave Rhodes, John Stephenson, and I think also for Jno. R. Smith, all of whom were cutting for Knight & Lovett on these lands. Jas. Kelly, Gus Skinner, Hardy Jordan, and Emanuel Huddleston were hauling at the same time for Knight & Lovett. There was no cutting done there to indicate late or fresh cutting prior to 1881. These lands were well timbered in 1881. Nearly all the merchantable timber has been removed from these lands; lands described herein.

LAFAYETTE JACKSON.

55 UNITED STATES } No. 1444.
vs.
LUTCHER & MOORE. }

D. R. KNIGHT sworn and examined on behalf of the Government:

I bought timber from W. H. Craft for Knight & Lovett from 1881 & '82, prior to July, 1882, when Knight & Lovett sold out all their business to Wm. J. Knight. I don't remember the amount of timber we bought. The timber I got from Craft in 1881, if I got any, was run in the spring of 1882, when I got back from Orange, in June, 1882, after making the run that year. Wm. H. Craft had some logs in the river at Ivy's bluff, Knight's landing, on Sabine river. This timber went to Wm J. Knight with all the balance of that timber we sold him when we sold out. The timber delivered to me after July, 1882, by W. H. Craft was delivered to me simply as an employee of Wm. J. Knight.

D. R. KNIGHT.

56 United States Circuit Court, Eastern District of Texas.

UNITED STATES
vs. } No. 1444.
LUTCHER & MOORE.

A. G. SKINNER sworn and examined on behalf of the Government:

I know where John R. Smith's house is and the Hardy Jordan log camp, James Kelly's house, and where the Almadane and Slayton Ford road runs half a mile east of John Smith's house. I have seen the maps made by Thos. J. Hickman, timber agent, and from the localities already mentioned I know the location of the N. ½ of the S. ½ and the N. ½ of the S. ½ of sec. 21, and the N. ½ of the S. W. ¼ of sec. 22, T. 2 S., R. 11 W. In 1881, during both seasons, I hauled timber off of all these lands for Knight & Lovett. I had a cart and three yoke of oxen. I got between $2.25 and $2.50 a thousand feet for hauling. The firm of Knight & Lovett was composed of D. R. Knight and J. A. Lovett.

A. G. SKINNER.

57 United States Circuit Court, Eastern District of Texas.

UNITED STATES
vs. } No. 1444.
LUTCHER & MOORE.

HARDY JORDAN, sworn and examined on behalf of the Government:

I drove a team and hauled a team for Knight & Lovett for two seasons. I hauled on the lands all around John R. Smith's house, from the Almadane road on the east to near Melton Smith's house on the west, and south of the sand hill north of the John R. Smith's house and on a line running on the north side of Jas. Kelly's house. I hauled this timber for Knight & Lovett. I don't know the section, township, or range where these lands lie; I testifies only from knowing the locality and land-marks I have spoken of in my testimony and which have been pointed out to me by Mr. Hickman as being on the map he made. The timber has been cut and hauled from all of this land except on a little strip near the Smith house.

his
HARDY x JORDAN.
mark.

Attest:
MONTFORT S. JONES.
THOS. J. HICKMAN.

58 United States Circuit Court, Eastern District of Texas.

UNITED STATES
vs.
LUTCHER & MOORE. } No. 1444.

D. R. KNIGHT sworn and examined on behalf of the Government:

I am a member of the firm of Knight and Lovett. The firm was composed of D. R. Knight and John A. Lovett. The firm of Knight & Lovett began business, I think, in 1879, near Loreto, La. We hauled logs and sold goods. The firm of Knight & Lovett sold out to Wm. J. Knight in July, 1882. The firm of Knight & Lovett did business only a short time at Loreto, when they moved out to Almadane, and afterwards sold out to Wm. J. Knight. The timber of Knight & Lovett cut in 1882 was run in the late spring of 1883. The timber cut in 1881 was run in the late spring of 1882 and was sold to Lutcher & Moore, to the best of my knowledge. I think Wm. J. Knight sold out to J. C. Knight & Co. in 1883; I think; I am not certain. The firm of J. C. Knight & Co was composed of J. C. Knight and my wife, Mrs. J. P. Knight. I looked after the interest of my wife in that firm at the store. I never contracted for any logs that I remember of. J. C. Knight, who was the head of the firm of J. C. Knight & Co., attended to that part of the business. I saw the contracts that were made by J. C. Knight & Co. I knew who the contracts were made with. I had no interest in Wm. J. Knight's business. I was the manager at the store and mill for Wm. J.
59 Knight after Knight & Lovett sold out to him. I was employed by him. I was paid $50.00 per month. I don't think Wm. J. Knight carried out the contracts Knight & Lovett had made before they sold out to him. I think Knight & Lovett sold to Wm. J. Knight on July 28th, 1882. We sold teams, logs, everything. I don't remember that D. R. Wingate ever got any timber from Knight & Lovett or Wm. J. Knight until after Lutcher & Moore quit buying. I don't know who got the timber in 1883 sold by Wm. J. Knight. The timber in 1882, I think, was delivered to Lutcher & Moore. The run I made in 1880 or 1881 I sold to W. F. Stewart & Co. They hired a mill at Orange, Texas.

D. R. KNIGHT.

60 United States Circuit Court, Eastern District of Texas.

UNITED STATES
vs.
LUTCHER & MOORE. } No. 1444.

WM. J. KNIGHT sworn and examined on behalf of the Government:

I succeeded the firm of Knight & Lovett either on the 28th or 29th July, 1882. I bought out all they owned at the time, teams, camps, store, logs, etc. I carried out contracts the firm of Knight

& Lovett had made before they sold out to me with Lutcher & Moore. The contracts were made with Lutcher & Moore.

I never sold any timber to D. R. Wingate up to the time I quit selling to Lutcher & Moore. I think the last run I sold to Lutcher & Moore was in 1883; it might have been in 1884. I think I sold out to J. C. Knight & Co. in the spring or summer of 1884.

W. J. KNIGHT.

61

UNITED STATES
vs.
LUTCHER & MOORE. } No. 1441.

J. R. SMITH sworn and examined on behalf of the Government:

I lived on the Annacoco in 1881–'2, sec. 21, T. 2 S., 11 W., Vernon parish, La. I lived there about 8 years; went on the place the last of 1880 or the first of 1881. I carried the chain for Mr. Hickman, special timber agent, when he located the land—that is, the S. ½ of the N. ½ and N. ½ of the S. ½ sec. 21 and south half of the N. W. ¼ and N. ½ of the S. W. ¼ sec. 22, T. 2 S., 11 W. I was engaged in cutting timber on sec. 21 in 1882. I think I cut for about 3 or 4 weeks; sometimes I had some person helping me and sometimes I cut by myself. During the time I had assistance I sawed the timber; when working by myself I cut the timber. I suppose myself and partners cut from 12 to 15 trees a day with a saw. I averaged about 4 or 5 trees a day when I cut by myself with an ax. I suppose I chopped about a week; the balance of the time we sawed. These trees would average between 700 to 800 feet to the tree, taking them all around. I got 60c. a thousand for cutting. I was employed by the firm of Knight & Lovett, composed of D. R. Knight & J. A. Lovett, to do the cutting. They paid me in supplies—tobacco, meat, sugar, dry goods, etc.—out of their store at Almadane at the rate of 60c. per thousand feet of timber. All the
62 cutting I did was done west of my house, about half a mile off, and between my house and Jordan's camp, a little to the south of the line. Jordan's camp is a little over half a mile from my house, in a northwest direction. During the time I was cutting other parties were cutting also. Some of the timber I cut was scaled by Lafayette Jackson. I know that E. J. Cain cut on this same land before and after I cut. I saw Jas. Kelly, Lafayette Jackson, Gus. Skinner, Hardy Jordan, Emanuel Huddleston hauling timber from these same lands; they hauled it to the Annacoco creek. They were hauling for Knight & Lovett. They hauled during two summers—in 1881 and 1882. I went on this land with the intention of homesteading it, and tried to get the numbers of the land for this purpose, but could not. I built a little dwelling-house, a log house, smoke-house, corn crib. I dug me a well of good water, cleared and fenced about 8 acres, and planted about an acre as an orchard in fig, plum, and mulberry trees. I had been on the land about two years when Knight & Lovett sent some men to cut the timber around my house. I moved them back and told them I wanted the land as a homestead, but Knight & Lovett claimed the

land. They said they had entered it. I wanted the 40 I lived on as a homestead. They, Knight & Lovett, had been cutting on the forties all around me. I gave up the idea of homesteading the land because Knight & Lovett claimed so positively they had entered it. I never knew the land had not been entered by
63 Knight & Lovett until Agent Kelsey came in there to look after the trespass on these lands in Dec., 1883. Mr. Kelsey was authorized by me to make the entry application for me at New Orleans and promised to do so, but Knight & Lovett beat him to New Orleans and made a cash entry for the land before Kelsey got there. I was deceived throughout and prevented from making a homestead entry, and defrauded out of the improvements I had made for that purpose by the false representations of Knight & Lovett. This timber was branded with a belt and three hacks. The timber I cut for Knight & Lovett was not cut on the land I wanted as a homestead.

J. R. SMITH.

64 United States Circuit Court, Eastern District *Court*.

UNITED STATES
vs.
LUTCHER & MOORE. } No. 1444.

JAMES KELLY sworn and examined on behalf of the Government:

In 1881 and 1882–3 I lived in a log camp and part of the time at the Skinner house. During this time I was hauling for Knight & Lovett, off and on, all the time. I had my own ox team, a log wagon, and 3 yoke of cattle. All the timber I hauled for Knight & Lovett was put into the Annacoco and its tributaries and carried down the Annacoco into the Sabine river. I hauled timber from sec. 22 east from the John Smith's and between there and the Almadane road, and also from sec. 21 west and south of the John Smith's, between his house and my house. The hauling west of John Smith's house extended from right around his house to a distance of two miles. This land extended from the old log camp south to the Annacoco creek. This same land lies between my house and John Smith's and the Melton Smith's log camp, which is between a mile and three-quarters of a mile west of John Smith's house. I hauled off of these lands for one season, which extends generally from June until October, until the ground got too soft to haul. I was employed by D. R. Knight and Jno. A. Lovett to do this hauling. I was paid $2.50 per 1,000 feet for hauling. I was paid in trade and provisions; some money; not much. I was paid
65 at the Almadane store. This store was established for logging camps—to furnish logging camps—as there was no farming done in that section of country to amount to anything. I hauled some of the timber that was cut by John R. Smith, E. J. Cain, and for others who did cutting on the same land. All the

timber was cut for Knight and Lovett. I know that Lafayette Jackson cut timber there. Gus. Skinner also had 3 yoke of oxen and a cart hauling timber; he rented the cart. He, Skinner, had also been hauling for wages before he bought his team, driving teams for Knight & Lovett. Knight & Lovett had as many as three teams in there—maybe more—three yoke of oxen to the hauling during this time. Hardy Jordan had also been driving one of Knight & Lovett's teams for wages for several seasons, until about the time they broke; just before the failure of Knight & Lovett. I think they failed in 1883, when he bought a team for himself and hauled. What I mean by the failure of Knight & Lovett is when they quit business and were succeeded by John Knight, for whom I also hauled. Emanuel Huddleson also hauled timber for Knight & Lovett for wages. These parties were all hauling off of this same land. The timber I hauled had Knight & Lovett's brand on it, which was a belt and three hacks. I think the timber was run out of there the season I was hauling by Dan. Knight.

his
JAMES x KELLY.
mark.

Attest:
MONTFORT S. JONES.
THOS. J. HICKMAN.

66 The foregoing depositions are indorsed as follows:

C. L. 1414. Publication made in open court, by order of court, at request of M. S. Jones, ass't U. S. attorney, Ap'l 1, 1890. C. Dart, clerk. Filed April 1, 1890. C. Dart, clerk.

67 *Agreement of Counsel to Continue and Waive Objections to form of Taking Depositions de bene esse. Filed Ap'l 2, '90.*

UNITED STATES	Nos. 425, 426, 427, 428, 430, U. S. Dist. Ct, &
vs.	1411, 1413, 1551, 1451, 1486, 1488, 1490,
LUTCHER & MOORE.	1519, 1521, 1536, U. S. Circuit Court, 5th Circuit & E'n Dist. Texas.

It it agreed in the cases of The United States *vs.* Lutcher & Moore that the same will be continued to the next term in the condition in which they now stand, and that neither party at the trial of said causes will take any objection to the form of taking testimony in any of said cases by the other *de bene esse* under sections 863 & 864, U. S. Revised Statutes. This applies to the testimony already taken only.

April 2nd, 1890.

MONTFORT S. JONES,
Sp'l Ass't U. S. Att'y.
JOSEPH H. WILSON,
U. S. Att'y, E'n Dist. Texas.
J. L. BRADFORD,
Att'y for L. & M.
W. B. DENSON,
Att'y for L. & M.

Indorsements: U. S. c'ts. 1443 & others. United States *vs.* Lutcher & Moore. Agreement of counsel to continue and waive objections to form of taking depositions *de bene esse*. Filed April 2, 1890. C. Dart, clerk.

68 *Order of Continuance.*

From minutes, March term.

APRIL 2D, 1890.

THE UNITED STATES } C. L. 1444.
vs.
LUTCHER & MOORE. }

Continued by agreement.

Order of Continuance.

From minutes, November term.

DECEMBER 5TH, 1890.

THE UNITED STATES } C. L. 1444.
vs.
LUTCHER & MOORE. }

Continued.

69 *Writ to Serve Copy of Notice by Plaintiff for Def'ts to Produce Books, etc. Issued Feb'y 20th, 1891.*

UNITED STATES OF AMERICA, }
Eastern District of Texas. }

In United States Circuit Court, at Galveston.

THE UNITED STATES } No. 1444.
vs.
LUTCHER & MOORE. }

The President of the United States to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to serve Lutcher & Moore, defendants in the above entitled and numbered case, or attorney of record with the accompanying certified copy of notice by plaintiff to produce upon the trial of the above entitled and numbered case all contracts and lumber and other books showing the purchases of timber in 1880 to 1887, inclusive.

Herein fail not and due return of this writ make.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the

United States for the eastern district of Texas, at Galveston, this 20th day of Feb'y, A. D. 1891.

C. DART,
Clerk U. S. Circuit Court, E. D. T., G.,
By W. L. HANSCOM, *Deputy.*

[SEAL.]

70 *Marshal's Return.*

Received this writ on the 20th day of February, 1891, and executed the same on the 25th day of February, 1891, by delivering to G. B. Moore, of the firm of Lutcher & Moore, in person, at Orange, Texas, in my district, the accompanying copy of notice to produce contracts & books mentioned herein.

Certified by the clerk of this court.

J. J. DICKERSON,
U. S. Marshal, Eastern District of Texas,
By J. M. WHELAN, *Deputy.*

Indorsements: United States circuit court, eastern district of Texas. No. 1444. The United States *v.* Lutcher & Moore. Writ to serve copy. Issued Feb'y —, 1891. C. Dart, clerk, by W. L. Hanscom, deputy. Returned and filed 26th day of Feb'y, 1891. C. Dart, clerk, by W. L. Hanscom, deputy.

71 *Order Setting Case.*

From minutes, March term.

MARCH 30, 1891.

THE UNITED STATES } C. L. 1444.
vs.
LUTCHER & MOORE. }

Set for March 6, 1891.

72 *Order on Motion of Assistant U. S. Attorney for Def'ts to Produce Books, etc. Entered March 7th,* 1891.

THE UNITED STATES } Nos. 1443, 1444, 1451, 1486, 1488, 1490,
vs. 1519, 1521, 1536, 1551.
LUTCHER & MOORE. }

Upon motion of the special assistant U. S. attorney in these causes and for cause shown it is ordered that the order to defendants to produce books and papers entered in above causes March 3d, 1891, be set aside, and that it now be ordered that defendants produce before the court instanter all books and papers in possession of their firm relating to the matters at issue in these causes, and particularly in case No. 1443, which may now be in the city of Galveston, and that they be ordered to produce in open court all other books and papers relating to the issues involved in said causes on 10th of March, 1891.

DAVID E. BRYANT, *Judge.*

73 *Writ to Serve Copy of Order of Date March 7th, 1891, Requiring Def'ts to Produce Books, etc.*

UNITED STATES OF AMERICA, }
Eastern District of Texas. }

In United States Circuit Court, at Galveston.

THE UNITED STATES }
v. } No. 1444.
LUTCHER & MOORE. }

The President of the United States to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to serve Messs. Lutcher & Moore, defendants, or their attorneys of record, Messs. Bradford & Denson, with the accompanying certified copy of order of March 7th, 1891, requiring them to produce books, &c.

Herein fail not and due return of this writ make.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States; and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 7th day of March, A. D. 1891.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court, E. D. T., G.,
By W. L. HANSCOM, *Deputy.*

74 *Marshal's Return.*

Received this writ on the 7th day of March, 1891, and executed the same on the 7th day of March, 1891, by delivering to H. J. Lutcher, of the firm of Lutcher & Moore, in person, at Galveston, in my district, the accompanying copy of order of court to def'ts to produce books, etc., certified by the clerk of this court.

J. J. DICKERSON,
U. S. Marshal, Eastern District of Texas,
By J. M. WHELAN, *Deputy.*

Indorsements: United States circuit court, eastern district of Texas. No. 1444. The United States *v.* Lutcher & Moore. Writ to serve copy. Issued March 7th, 1891. C. Dart, clerk, by W. L. Hanscom, deputy. Returned and filed 7th day of March, 1891. C. Dart, clerk, by W. L. Hanscom, deputy.

75 *Order: Case Began and Jury Impaneled.*

From minutes, March term.

THE UNITED STATES
vs.
LUTCHER & MOORE. } C. L. 1444.

MARCH 9TH, 1891.

On this day came the parties to this suit, by their attorneys, and, both parties announcing ready, thereupon came a jury of good and lawful men, to wit, Sol. Levy, R. L. Smith, J. Mellon, P. Levine, T. J. Owens, W. C. Duebner, Wm. H. Bedell, Richard Hancock, Alphonse Dreyfus, P. E. McKenna, Geo. Garner, and J. Kelly, who being duly elected, tried, empaneled, and sworn well and truly to try the issues and accepted by the parties, thereupon the trial of the case proceeded; but the trial not being concluded, the further consideration of the case was postponed until tomorrow, and the jury permitted to disperse under instructions from the court.

76 *Order Requiring Marshal to Furnish Meals for Jury. Entered March 10th, 1891.*

UNITED STATES
vs.
LUTCHER & MOORE. } C. L. No. 1444.

TUESDAY, *March* 10, '91.

In this case it is ordered that the marshal furnish the jury in this case with meals so long as held together in considering their verdict.

DAVID E. BRYANT, *Judge.*

Order: Case Submitted March 10th, 1891.

From minutes.

United States Circuit Court, Eastern District of Texas, at Galveston. C. L. No. 1444.

THE UNITED STATES
vs.
LUTCHER & MOORE. } Law. No. 1444.

MARCH 10TH, 1891.

On this day again came the parties to this suit, by their attorneys, and thereupon the trial of the case was resumed and the trial concluded, and the jurors aforesaid, duly impaneled and sworn in this case, having heard the pleadings and the evidence and argument of counsel and having received the charge of the court, retired to consider of their verdict.

77 *Certificate of Entry No. 23. Paper Admitted in Evidence.*

B.

(To be delivered to the locator.)

Certificate of Entry. Register's No., 23.

Acts of June 22, 1860, March 2, 1867, and June 10, 1872.

REGISTER'S OFFICE, NEW ORLEANS, LA., *Sept'r 9th*, 1879.

I certify that certificate of location No. S 89 for eighty (80) acres, issued by virtue of a decree rendered on the 25th day of March, 1878, by the Supreme Court of the United States, has this day been located by John A. Lovett, of Vernon parish, Louisiana, on the N. E. ¼ of N. E. ¼ sec. 20 & N. W. ¼ of n'west quarter of section No. twenty-one, in township No. two (2) south, of range No. eleven (11) west, containing eighty $\frac{20}{100}$ acres in southwest district Louisiana.

WM. M. BURNELL, *Register*.

78 No. 4497. Certificate No. B 23.

RECEIVER'S OFFICE AT
NEW ORLEANS, LA., *Sept. 9th*, 1879.

Received from John A. Lovett, of Vernon parish, Louisiana, the sum of no dollars and thirty-three cents, being in full for the excess on supreme court scrip No. S 89, March 25th, 1878, act of June 22nd, 1860, &c., 80 acres located on the N. E. ¼ of N. E. ¼ sec. 20 & N. W. ¼ of N. W. ¼ *quarter* of section No. twenty-one, in township No. two (2) south, of range No. eleven (11) west, containing no acres and twenty-six (26) hundredths, at $1.25 per acre.

GEO. BORDEN, J., *Receiver*.

80.33.

79 STATE OF LOUISIANA:

Patent No. 3012.

To all to whom these presents shall come, Greeting:

Whereas T. S. Knight, of the parish of Vernon, in the State of Louisiana, purchased per certificate No. 2585, N. S. D., June 1st, 1878, southeast quarter of southwest quarter and southwest quarter of southeast quarter of section No. fifteen and northeast quarter of northwest quarter and northwest quarter of northeast quarter of section No. twenty-two, in township two south, of range eleven west, in the southwestern district, containing one hundred and fifty-nine $\frac{56}{100}$ acres (159,86), settlement and cultivation according to the official plat of the survey of said lands in the State land office:

Now, know ye that the State of Louisiana, in consideration of the premises and in conformity with law in such case made and provided, has given, granted, and sold, and by these presents does give, grant, and sell, unto the said T. S. Knight and to his heirs the

above-described land; to have and to hold the same, together with all the rights, titles, and privileges thereunto belonging, unto the said T. S. Knight and to his heirs and assigns forever.

In testimony whereof I, Francis Tillon Nicholls, governor of the State of Louisiana, have caused these letters to be made patent and the seal of the State land office to be hereunto affixed.

80 Given under my hand, at the city of New Orleans, on the first day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and second.

By the governor:

FRANCIS T. NICHOLLS.

[SEAL.] L. FREMAUX, *Register.*

Record of patent, vol. 19, page 267.

81 Certificate No. 7492.

The United States of America to all to whom these presents shall come, Greeting:

Whereas Ellen C. Lovett, of Vernon parish, Louisiana, has deposited in the General Land Office of the United States a certificate of the register of the land office at New Orleans, Louisiana, whereby it appears that full payment has been made by the said Ellen C. Lovett, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the southwest quarter of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-two, in township two south, of range eleven west, of Louisiana meridian, in Louisiana, containing eighty-one acres and ninety-seven hundredths of an acre according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general; which said tract has been purchased by the said Ellen C. Lovett:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Ellen C. Lovett and to her heirs the said tract above described; to have and to

82 hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Ellen C. Lovett and to her heirs and assigns forever.

In testimony whereof I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twentieth

day of June, in the year of our Lord one thousand eight
[SEAL.] hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 13, page 287.

83 Certificate No. 7493.

The United States of America to all to whom these presents shall come, Greeting:

Whereas Ellen C. Lovett, of Vernon parish, Louisiana, has deposited in the General Land Office of the United States a certificate of the register of the land office at New Orleans, Louisiana, whereby it appears that full payment has been made by the said Ellen C. Lovett, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the south half of the northwest quarter, the south half of the northeast quarter, the north half of the southwest quarter, and the north half of the southeast quarter of section twenty-one, in township two south, of range eleven west, of Louisiana meridian, in Louisiana, containing three hundred and twenty-eight acres and forty-eight hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general; which said tract has been purchased by the said Ellen C. Lovett:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said Ellen C. Lovett and to her heirs the said tract above described; to have
84 and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Ellen C. Lovett and to her heirs and assigns forever.

In testimony whereof I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the
[SEAL.] twentieth day of June, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 13, page 288.

87 *Verdict & Judgment. Filed and Entered on the Minutes, March Term, March 11th, 1891.*

United States Circuit Court, Eastern District of Texas, at Galveston.

THE UNITED STATES
vs.
LUTCHER & MOORE. } Law. No. 1444.

MARCH 11, 1891.

On this day again came the parties to this suit, by their attorneys, and the jurors aforesaid, duly impaneled and sworn in this case, being now in court here, returned into open court their verdict as follows:

"GALVESTON, *March* 11, 1891.

We, the jury, find a verdict for the plaintiff for thirty-one hundred and fifty $\frac{00}{100}$ dollars, with 8% interest from March 11th, 1887.

P. E. McKENNA, *Foreman.*"

Wherefore it is considered by the court, and so ordered, adjudged, and decreed, that the plaintiff herein, The United States of America, do have and recover from the defendants herein, H. J. Lutcher and G. B. Moore, composing the firm of Lutcher & Moore, and of and from the said firm of Lutcher & Moore, the
$3,150 said sum of thirty-one hundred and fifty dollars, with in-
1,008 terest thereon from the 11th day of March, 1887, to this
——— date, at the rate of 8 per cent. per annum, $1,008.00, mak-
4,158 ing in the aggregate the sum of $4,158.00, together with all costs about this suit sustained and together
86 with interest on said last-named sum at the rate of 8 per cent. per annum from this date until paid, and have execution therefor.

DAVID E. BRYANT, *Judge.*

87 *Defendants' Motion for a New Trial. Filed March 12th, 1891.*

In Circuit Court of the United States, Eastern Dist. of Tex., at Galveston.

THE UNITED STATES
vs.
LUTCHER & MOORE. } No. 1444. C. L.

Now come the defendants in the above styled and numbered cause and move the court to set aside the verdict and judgment rendered herein for the following reasons, to wit:

First. Because the court erred in admitting in evidence upon the trial of said cause the written statements of the following-named persons, witnesses for plaintiff, to wit:

Wm. J. Knight, Henry Dixon, Emanuel Huddleston, Lafayette Jackson, A. G. Skinner, Hardy Jordan, D. R. Knight, Jas. Kelly,

J. R. Smith, and Edward J. Cain, which written statements bear no certificate of an officer that they were sworn or under oath when said statements were reduced to writing.

That said written statements have no standing in court as depositions of witnesses, as they do not appear to have been taken by any officer whatever.

88 Second. Because the court erred in refusing to give the special charges to the jury asked by defendants, which are annexed hereto and marked respectively special charges 1, 2, 3, 4, 5, 6.

Third. Because the court erred in refusing to charge the jury that there was no evidence of bad faith on part of defendants in the purchase of timber.

Fourth. Because the verdict of the jury is unsupported by and against the evidence in this: that there was no evidence that Knight & Lovett sold to defendants any of the timber which came from the Gov't land charged to have been trespassed upon. There was no evidence which showed with any degree of certainty the amount of timber cut by Knight & Lovett from said lands.

Fifth. Because the verdict of the jury is excessive in the extreme upon any amount of timber which, as shown by the evidence, could have been taken from the lands charged to have been trespassed upon.

By their counsel, J. L. BRADFORD,
W. B. DENSON.

Indorsements: No. 1444. C. L. The United States *vs.* Lutcher & Moore. Defendants' motion for a new trial. Filed March 12, 1891. C. Dart, clerk, by W. L. Hanscom, deputy. J. L. Bradford, W. B. Denson, att'ys for defts.

89 *Order. Motion for New Trial Heard and Submitted.*

From minutes, March 19th, 1891.

THE UNITED STATES } C. L. 1444.
vs.
LUTCHER & MOORE. }

On this day again came the parties to this suit, by their attorneys, and thereupon the motion of the defendants for a new trial was heard and argued and submitted and taken under advisement by the court.

Order. Overruling Motion for New Trial.

From minutes, March 21, 1891.

THE UNITED STATES } C. L. 1444.
vs.
LUTCHER & MOORE. }

Ordered, that the motion of the defendants herein for a new trial be overruled.

90 *Petition of Defendants for Writ of Error. Filed March 27, 1891.*

To the honorable the judges of the circuit court of the United States for the 5th circuit and eastern district of Texas, holding sessions at Galveston:

The petition of Henry J. Lutcher and G. Bedell Moore with due respect doth show that they are aggrieved by the verdict and judgment against them in the suit entitled United States *vs.* Lutcher & Moore, No. 1444, on the law docket of this hon. court, in which there is manifest error, to the great injury of your petitioners, and that they desire to cause the same to be reviewed by the circuit court of appeals for the 5th circuit, to be holden at New Orleans, Louisiana, on the 3rd Tuesday of June next, under the late act of Congress creating said court of appeals, approved on the 3rd day of March, 1891.

The premises considered, your petitioners pray for an order of appeal by writ of error to operate as a supersedeas, on your petitioners giving bond and security as the law directs.

By their attorneys, J. L. BRADFORD,
W. B. DENSON.

Galveston, M'ch 27th, 1891.

I hereby accept service and waive copy of within petition.
ROBT E. HANNAY,
U. S. Att'y E. D. T.

91 Indorsements: No. 1444. U. S. circ. c't, E. dist. of Texas, at Galveston. United States *vs.* Lutcher & Moore. Petition of def'ts for writ of error. Filed March 27, 1891. C. Dart, clerk.

92 *Writ of Error. Filed March 27th, 1891.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Texas, at Galveston, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between United States, plaintiffs, and the firm of Lutcher & Moore, consisting of Henry J. Lutcher and G. Bedell Moore, defendants, a manifest error hath happened, to the great damage of the said firm of Lutcher & Moore, consisting of the said Henry J. Lutcher and G. Bedell Moore, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of appeals of the 5th circuit of the United States, together with this writ, so that you have the same at New Orleans on the third Tuesday of June next, in the said circuit of appeals to
93 be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of March,
[SEAL.] in the year of our Lord one thousand eight hundred and ninety-one.

C. DART,
Clerk of the United States Circuit Court for the Eastern District of Texas, at Galveston.

Allowed April 3, 1891.

DAVID E. BRYANT, *Judge*.

Indorsements: United States circuit court eastern district of Texas, at Galveston. No. 1444. United States *versus* Lutcher & Moore. Writ of error. Filed March 27th, 1891. C. Dart, clerk.

94 *Copy Writ of Error. Filed March 27, 1891.*

UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Texas, at Galveston, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between United States, plaintiffs, and the firm of Lutcher & Moore, consisting of Henry J. Lutcher and G. Bedell Moore, defendants, a manifest error hath happened, to the great damage of the said firm of Lutcher & Moore, consisting of the said Henry J. Lutcher and G. Bedell Moore, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of appeals of the 5th circuit of the United States, together with this writ, so that you have the same at New Orleans on the third Tuesday of June next, in the said circuit court of
95 appeals to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court of ap-

peals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Jus-
[SEAL.] tice of the Supreme Court of the United States, this 27th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

C. DART,
Clerk of the United States Circuit Court for the Eastern District of Texas, at Galveston.

Allowed by D. E. Bryant, U. S. dist. judge, April 3, 1891.

D. E. BRYANT,
U. S. Judge.

Indorsements: United States circuit court, eastern district of Texas, at Galveston. No. 1444. United States *versus* Lutcher & Moore. Duplicate copy writ of error. Filed March 27th, 1891. C. Dart, clerk. Deposited in clerk's office, for defendants in error, March 27, 1891. C. Dart, clerk.

96 *Defendants' Bill of Exceptions. Filed March* 31, 1891.

United States Circuit Court, Fifth Circuit and Eastern District of Texas, at Galveston.

UNITED STATES }
vs. } Law Docket, No. 1444.
LUTCHER & MOORE. }

Be it remembered that upon the trial of the above entitled cause the jury having been duly sworn and impaneled to try the issues of fact therein and the plaintiff having begun the examination of their witnesses before the court and jury and the introduction in evidence of documentary proof to sustain their case, offered to read to said jury a paper purporting to be the depositions *de bene esse* of Wm. J. Knight, Henry Dixon, Emanuel Huddleston, Lafayette Jackson, A. G. Skinner, Hardy Jordan, D. A. Knight, James Kelly, J. R. Smith, and Edward J. Cain, which paper was as follows: Containing 1st an affidavit of Montfort S. Jones, as assistant United States district attorney for the eastern district of Texas, that the testimony of the above named witnesses living in the western district of Louisiana is material and necessary for the plaintiff in the prosecution of said cause.

2nd. "Let E. J. Cain, Jno. R. Smith, James Kelly, Lafayette Jackson, Emanuel Huddleston, Wm. H. Craft, A. J. McCranie, Silas Fowler, Wm. J. Knight, Gus Skinner, Hardy Jordan, Henry Dixon,
and D. R. Knight, the witnesses named in the foregoing affi-
97 davit, be examined *de bene esse* before me at Alexandria, Louisiana, on the — day of ——, A. D. 1890, at — p. m., and

let — days' notice be given to said defendants (or to ——, the attorney of said defendants, as either may be nearest) of such examination, provided either defendants or said attorney may live or be found within 100 miles of Alexandria, said place of examination.

Witness my hand and seal officially this, the 25th day of Jan'y, A. D. 1890. (Signed) J. B. Beattie, U. S. Com'r W. Dist., La." and had read a part of said paper, to wit: that part signed Edwd. Cain and D. R. Knight, when the defendants, by their counsel, then and there before said jury and the court objected to the further reading of the same in evidence on the part of plaintiff, and moved orally that the same be suppressed by the court and the jury be instructed to disregard the same as evidence on the following grounds:

1. That said paper did not on its face purport to be or contain the depositions of said witnesses or any of them, and was nothing more than a series of written statements purporting to have been signed by them respectively.

2. That said paper was not accompanied by any caption, as required by law, showing by and before what magistrate or authority the same was taken and signed.

3. That said paper was not accompanied, as required by law, with any certificate of any officer or magistrate showing the rea-
98 sons for the taking of the same, the time and place of taking; that the statements therein contained were written down by witnesses in the the presence of the magistrate or by the magistrate himself, or that the same were sworn to by said witnesses or any of them.

But the court then and there overruled said objection and said motion to strike out, to exclude and suppress, and refused to instruct the jury to disregard said paper as evidence on the part of plaintiff, so far as the same had been read, and permitted plaintiff to read the whole of the same as evidence on their part and to submit the same to said jury for the reasons then and there alleged—

1st. That a motion to suppress and objections to said evidence had not been filed before the parties announced ready for trial in said cause.

2nd. Because said paper had been on file in said cause since the 1st day of April, 1890, one day before the agreement was signed and filed, and that said paper was received in an envelope endorsed as follows:

D. L. 427 & other cases. Received from the post office at Galveston, Texas, March 27th, 1890. C. Dart, clk. by W. L. Hanscom, deputy. Filed March 21st, 1890. C. Dart, clerk, by W. L. Hanscom, deputy. Publication made in open court by order of
99 court at request of M. S. Jones, asst. U. S. attorney, April 1st, 1890. C. Dart, clerk. M. S. Jones, asst. U. S. att'y. Galveston, Texas. Endorsed on back: "Official business. Mr. M. S. Jones, asst. U. S. att'y, Galveston, Texas, care cl'k U. S. courts."

Each of said written statements of the witnesses aforesaid had the following caption:

U. S. Circuit Court, 5th Circuit, Eastern Dist., Texas.

UNITED STATES }
vs. } No. 1441.
LUTCHER & MOORE. }

—— —— (giving name of witness) sworn and examined on behalf of plaintiff.

3rd. Because the plaintiff and defendants had made and filed among the papers of this cause the following written agreement, viz:

100 UNITED STATES *vs.* LUTCHER & MOORE. } Nos. 425, 426, 427, 428 U. S. Dist. Ct, & 1441, 1443, 1551, 1451, 1486, 1490, 1509, 1521, 1536 U. S. Circuit Ct, 5th Circuit, & E'n Dist. of Texas.

It is agreed in the cases of the United States *vs.* Lutcher & Moore that the same will be continued to the next term in the condition in which they now stand, and that neither party at the trial of said causes will take any objection to the form of taking testimony in any of said cases by the other *de bene esse* under sections 863 & 864, U. S. Revised Statutes. This applies to the testimony already taken only.

April 2nd, 1890.

MONTFORT S. JONES,
Spl. Ass't U. S. Att'y.
JOSEPH H. WILSON,
U. S. Att'y, E'n Dist. Texas.
J. L. BRADFORD & W. B. DENSON,
Att'ys for Lutcher & Moore.

Filed April 2, 1890.

To which ruling of the court in overruling said objection and said motion to suppress, and refusing to so instruct the jury, the defendants then and there, by their counsel, in open court and before said jury had retired to consider of their verdict, duly excepted and tendered this their bill of exceptions, and prayed that the same be allowed and signed and made part of the record of this case, all of which is done and allowed this 31st day of March, 1891.

DAVID E. BRYANT, *Judge.*

101 The foregoing bill of exceptions is indorsed as follows:

C. L. 1441. The United States *v.* Lutcher & Moore. Defendants' bill of exceptions. Filed March 31, 1891. C. Dart, clerk.

102 *Bill of Exceptions. Filed by Def'ts March* 31, 1891.

Circuit Court of the United States in and for the 5th Circuit & Eastern District of Texas, Holding Sessions at Galveston, in said Circuit and State.

UNITED STATES } Circuit Court. Law Docket, No. 1444.
vs.
LUTCHER & MOORE. }

Be it remembered that on the trial of the above cause, the jury having been sworn & impaneled to try the issues of fact therein raised by the pleadings, and the evidence for the plaintiffs having been concluded and submitted, the defendants offered in evidence the patents issued by the United States on the 20th day of June, A. D. 1885, to Ellen C. Lovett for nearly the whole of the land on and from which the timber was alleged to have been cut and removed, to wit, the south half of the north half & the north half of the south half of section twenty-one and the southwest quarter of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-two, in T. 2 S., R. 11 W., in order to show that when said suit was brought by said plaintiffs, to wit, on the 11th day of March, A. D. 1887, said plaintiff was without any interest in the land so described in and conveyed by said patents, and hence could not maintain said suit against said defendants for or on account of any trespass committed on the said lands before

103 the dates of said patents, but the court refused to allow said patents to go to the jury for such purpose, but admitted the same in evidence solely for the purpose of showing that at the date of said patents the plaintiffs had conveyed a fee-simple title in and to said lands to the said patentee, Ellen C. Lovett, and when the court came to charge the jury in said cause and before they had retired to consider of their verdict the defendants prayed the said court to charge them as follows:

"The defendants request the court to charge the jury that if they find from the evidence that the United States, after the date of the alleged cutting and removal of the timber from the lands described in the petition, sold all of said land or the greater part thereof to Ellen C. Lovett and received from her the cash price for the same, at which price the lands prior to said alleged trespass had been subject to entry and sale, and that the said United States at the time of said sale issued to said purchaser the usual evidence of title, and afterwards issued to her the United States patents for the same, and after the date of said patents brought this action against these defendants, then they will find for the defendants for so much timber as they find to have been cut upon and removed from the land so sold, whether or not the evidence shows that all or any of it came into the possession of said defendants."

Which charge the court then and there refused; to which

104 refusal of the said court to admit said patents in evidence, except to show that at their date the plaintiff had made full

conveyance of said lands, and the further refusal of said court to instruct the jury as above prayed, the defendants, by their counsel, then and there, in open court and before said jury had retired, excepted and tendered this their bill of exceptions and asked that the said patents be made a part of the same, and that the same may be allowed and made a part of the record, which is done this — day of March, A. D. 1891.

This bill is allowed with this explanation: The evidence showed that the timber had been cut and removed from the lands and converted prior to any right of Ellen C. Lovett to said lands, and held that the timber being the property of the United States when converted that its right of action was not relinquished by a subsequent conveyance of the land, and that said timber was not cut and removed by Ellen C. Lovett or her agents.

This March 30th, 1891.

DAVID E. BRYANT, *Judge.*

Indorsements: No. 1444. U. S. circuit c't, 5th circ't & E. dist. of Texas, at Galveston. United States *vs.* Lutcher & Moore. Bill of exceptions of defendants. Filed March 31, 1891. C. Dart, clerk.

105 *Bill of Exceptions of Defendants. Filed March* 31, 1891.

United States Circuit Court in and for the 5th Circuit and Eastern District of Texas, at Galveston, Texas.

UNITED STATES } *vs.* LUTCHER & MOORE. } No. 1444, Law Docket.

Be it remembered that on the trial of this cause, the jury having been sworn and impaneled to try the issues of fact therein, and the evidence on both sides having been closed and submitted, the defendants, by their counsel, requested the court to charge the jury as follows:

1st. "If the jury find from the evidence that any of the logs alleged in the petition to have been cut from the lands described were so cut and removed in good faith, and that said logs or any portion of them afterwards went into the possession & control of the defendants, and they, the defendants, acted in good faith, they can only find a verdict in favor of the plaintiff for the amount which went into defendants' possession, in which case the verdict can only be for the value of the logs as they lay upon the land after being cut and sawed and ready to be hauled away."

106 2nd. "That the petition of the plaintiff in this cause not having alleged and charged that the original cutting and removal of the timber described in said petition was done in bad faith by Knight & Lovett, they will reject all evidence introduced by the plaintiff tending to show such bad faith on the part of said Knight & Lovett."

3rd "That the defendants are not required to show that Knight & Lovett got the timber from their own or other lands than that charged in the petition, but it is the duty of the plaintiff to show that the timber charged to have been received by the defendants, Lutcher & Moore, came from the particular lands charged in plaintiff's petition."

4th. "That in order to enable the plaintiff to recover in this case it is necessary to show with a reasonable degree of certainty the amount taken in the trespasses charged and for which a verdict is found."

But the court then and there refused to give any and all of said instructions to the jury; to which refusal of the court so to charge the defendants then and there, in open court and before said jury had retired to consider of their verdict, duly excepted and tendered this their bill of exceptions and prayed that the same be allowed and signed and made of record, all of which is accordingly done on this — day of March, A. D. 1891.

This bill is allowed with this explanation: The 1st and 2nd paragraphs of charges were not warranted by the pleading,

107 and therefore refused.

As to the 3rd paragraph the jury were instructed that no verdict could be found for the pl'ff unless the evidence showed to their satisfaction to a reasonable certainty that the timber was cut and removed from the lands described in the petition and between the dates alleged in the petition, and that Lutcher & Moore received, paid for, and converted the same to their own use and benefit.

The 4th paragraph was given as requested.

This March 30, 1891.

DAVID E. BRYANT, *Judge*.

Indorsements: No. 1444. U. S. circ't ct, 5th circ't & E. dist. of Texas, at Galveston. United States *vs.* Lutcher & Moore. Bill of exceptions of defendants. Filed March 31st, 1891. C. Dart, clerk.

108 *Order Fixing Bond for Writ of Error.*

From minutes March 31st, 1891.

THE UNITED STATES } C. L. 1444.
vs.
LUTCHER & MOORE. }

Ordered that the supersedeas bond to be executed by the defendants be fixed at the sum of five thousand (5,000) dollars, said bond to be filed within thirty days from this date.

109 *Bond for Writ of Error. Filed April 6, 1891.*

Know all men by these presents that we, Henry J. Lutcher and G. Bedell Moore, composing the firm of Lutcher & Moore, as principals, and Charles H. Moore and David Freeman, as surety, are held

and firmly bound unto the United States of America in the full and just sum of five thousand ($5,000.00) dollars, to be paid to the said United States of America, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of April, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Texas, at Galveston, in a suit, No. 1411, depending in said circuit court, wherein The United States of America are plaintiffs and H. J. Lutcher & G. Bedell Moore (Lutcher & Moore) are defendants, judgment was rendered against the firm of Lutcher & Moore, composed of H. J. Lutcher and G. Bedell Moore, defendants, and the said Lutcher & Moore having obtained a writ of error and
140 filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States, citing and admonishing them to be and appear at the circuit court of appeals of the United States to be holden at New Orleans, La., the third Tuesday of June next:

Now, the condition of the above obligation is such that if the said Lutcher & Moore shall prosecute their writ to effect and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LUTCHER & MOORE. [L. S.]
CHARLES H. MOORE. [L. S.]
DAVID FREEMAN. [L. S.]

Sealed and delivered in the presence of—

Taken & acknowledged before me by Chas. H. Moore and David Freeman.
Apl 1, 1891.
[SEAL.]

C. DART,
Com'r U. S. Circ't Court, E. D. T.

UNITED STATES OF AMERICA, } ss.
Eastern District of Texas, at Galveston. }

Personally appeared Charles H. Moore and David Freeman, who, being duly sworn, deposes and says, each for himself, that he is the surety on the within bond; that he resides at Galveston, Texas, and is worth the full sum of five thousand dollars over and above all his debts and liabilities and property exempt from execution.

CHARLES H. MOORE.
DAVID FREEMAN.

111 Subscribed and sworn before me this 1st day of April, 1891.

C. DART,
[SEAL.] *Commissioner U. S. Circuit Court, Eastern District of Texas.*

Approved April 3, 1891.

DAVID E. BRYANT, *Judge.*

Indorsement: No. 1444. United States circuit court, eastern district of Texas, at Galveston. United States *vs.* Lutcher & Moore. Bond for writ of error. Filed April 6th, 1891. C. Dart, clerk.

112 *Citation on Writ of Error to Circuit Court of Appeals. Issued April 6th, 1881.*

UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the circuit court of appeals of the United States to be holden at New Orleans, La., on the third Tuesday of June next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, wherein Henry J. Lutcher and G. Bedell Moore, composing the firm of Lutcher & Moore, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3d day of April, in the year of our Lord one thousand eight hundred and ninety-one.

[SEAL.] DAVID E. BRYANT,
U. S. Dist. Judge.

113 On this 28th day of April, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared John M. Whelan before me, the subscriber, C. Dart, clerk of the U. S. circuit court for the eastern district of Texas, and makes oath that he delivered a true copy of the within citation to Robert E. Hannay, U. S. attorney for the eastern district of Texas, at Paris, Texas, on the 24th day of April, 1891.

JOHN M. WHELAN,
Deputy U. S. Marshal, E. D. of Texas.

Sworn to and subscribed the 28th day of April, A. D. 1891.

C. DART,
[SEAL.] *Clerk U. S. Cir't Court, Eastern Dist. of Texas.*

Indorsements: C. L. No. 1444. The United States *v.* Lutcher & Moore. Citation on writ of error to circuit court of appeals. Issued April 6th, 1891. C. Dart, clerk. Returned and filed April 28, 1891. C. Dart, clerk.

114 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of all proceedings in cause No. 1444 on the law docket of said court, entitled The United States *vs.* Lutcher & Moore, as the same now appears in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 4th day of May, A. D. 1891.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, E. D. T.,
By W. L. HANSCOM, *Deputy*.

[Endorsed:] No. 1444. United States circuit court, eastern district of Texas. The United States *vs.* Lutcher & Moore. Copy of the record and of all proceedings in the cause.

115 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Texas, at Galveston, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between United States, plaintiffs, and the firm of Lutcher & Moore, consisting of Henry J. Lutcher & G. Bedell Moore, defendants, a manifest error hath happened, to the great damage of the said firm of Lutcher & Moore, consisting of the said Henry J. Lutcher and G. Bedell Moore, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of appeals of the 5th circuit of the United States, together with this writ, so that you have the same at New Orleans on the third Tuesday of June next, in the said circuit court of appeals to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 27th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Seal United States Circuit Court, Eastern District of Texas.

C. DART,
Clerk of the United States Circuit Court for the Eastern District of Texas, at Galveston.

Allowed April 3, 1891.

DAVID E. BRYANT, *Judge.*

[Endorsed:] United States circuit court, eastern district of Texas, at Galveston. No. 1444. United States *versus* Lutcher & Moore. Writ of error. Filed March 27th, 1891. C. Dart, clerk.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the circuit court of appeals of the United States, to be holden at New Orleans, La., on the third Tuesday of June next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, wherein Henry J. Lutcher and G. Bedell Moore, composing the firm of Lutcher & Moore, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of April, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal United States Circuit Court, Eastern District of Texas.]

DAVID E. BRYANT,
U. S. Dist. Judge.

[Endorsed:] C. L. No. 1444. The United States *v.* Lutcher & Moore. Citation on writ of error to circuit court of appeals. Issued April 6th, 1891. C. Dart, clerk. Returned and filed April 28, 1891. C. Dart, clerk.

April 24

On this 28th day of April, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared John M. Whelan before me, the subscriber, C. Dart, clerk U. S. circuit court for the eastern district of Texas, and makes oath that he delivered a true copy of the within citation to Robert E. Hannay, U. S. attor-

ney for the eastern district of Texas, at Paris, Texas, on the 24th day of April, 1891.

JOHN M. WHELAN,
Deputy U. S. Marshal, E. D. of Texas.

Sworn to and subscribed the 28th day of April, A. D. 1891.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circ't Court, Eastern Dist. of Texas.

117 *Petition and Order for Writ of Error. Filed July 2, 1891.*

Circuit Court of the United States, 5th Circuit and Eastern District of Texas, Holding Sessions at Galveston, Texas.

UNITED STATES
vs. } No. 1441. Law Docket.
LUTCHER & MOORE.

To the Hon. L. Q. C. Lamar, associate justice of the Supreme Court of the United States, in chambers:

The petition of Lutcher & Moore, consisting of Henry J. Lutcher and G. Bedell Moore, defendants in the above-entitled cause, with due respect doth show—

That a judgment in said cause was rendered and signed on the 11th day of March, 1891, in favor of plaintiffs and against your petitioners for the sum of $1,158, together with all costs and interest on said sum at the rate of 8 per cent. per annum from said date, which said judgment became final on the 21st March, 1891.

That thereafter your petitioners, believing there was error to their prejudice in the verdict and judgment against them in said cause, removed said cause by writ of error to the circuit court of appeals in and for the 5th circuit under the late act of Congress, approved on the 3rd day of March, 1891, providing for circuit courts of appeals, the said writ being made returnable in said court on the 3rd Tuesday in June, 1891.

118 That said writ was a supersedeas and was duly served, the proper security given, and citation issued and served.

That on Wednesday, the 17th day of June, 1891, after the said circuit court of appeals for the 5th circuit had organized, your petitioners offered in said court to docket said cause and to file the transcript of the record thereof, but the court, on considering the objections by the defendants in error, refused to allow the same, on the ground that under the sixth section of said act of March 3d, 1891, these petitioners should have taken said cause for review to the Supreme Court of the United States, and not to the said circuit court of appeals.

The premises duly considered, your petitioners pray that they may be allowed a writ of error from the Supreme Court of the

United States, directed to the said circuit court for the eastern district of Texas, where the record in said cause is, to remove said cause for review to said Supreme Court, and that the same may be made returnable in 30 days from the date of citation, and that said writ may operate as a supersedeas and stay execution on said judgment upon these petitioners giving bond and security according to law in the sum of five thousand dollars, conditioned as the law requires.

New Orleans, La., June 20, 1891.

By their attorney, J. L. BRADFORD.

Let the writ of error as asked for within be issued, signed, and sealed by the clerk of the circuit court of the United States for the 5th circuit and eastern districts of Texas, at Galveston, to re-
119 move the cause for review to the Supreme Court of the United States under section six of the act of Congress approved March 3rd, 1891, establishing circuit courts of appeals; and let the same be served according to law and be made returnable to said Supreme Court not exceeding thirty days from and after the citation shall be signed; and let the said writ operate as a supersedeas upon the plaintiffs in error giving bond and security in the sum of five thousand dollars, conditioned according to law; the said bond to be submitted to me for approval and citation according to law.

New Orleans, La., June 20, 1891.

LUCIUS Q. C. LAMAR,

Associate Justice of the Supreme Court of the United States.

Indorsements: No. 1414. U. S. circuit court, 5th cir. & eastern dist. of Texas, at Galveston. United States *vs.* Lutcher & Moore. Petition and order for writ of error. Filed July 2, 1891. C. Dart, clerk.

120 *Bond for Writ of Error. Filed July 16th*, 1891.

Know all men by these presents that we, Henry J. Lutcher & G. Bedell Moore, composing the firm of Lutcher & Moore, as principals and Charles H. Moore and David Freeman as sureties, are held and firmly bound unto the United States of America in the full and just sum of five thousand dollars, to be paid to the said United States of America, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of July, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Texas, at Galveston, in a suit, No. 1414, depending in said circuit court, wherein the United States of America are plaintiffs and Henry J. Lutcher and G. Bedell Moore (Lutcher & Moore) are defendants, judgment was rendered against the firm of Lutcher & Moore, com-

posed of Henry J. Lutcher & G. Bedell Moore, defendants, and the said Lutcher & Moore having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States, citing and admonishing them to be and appear
121 at the Supreme Court of the United States to be holden at Washington on a day not exceeding 30 days from the day of signing the citation:

Now, the condition of the above obligation is such that if the said Lutcher & Moore shall prosecute their writ to effect and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LUTCHER & MOORE,
By G. BEDELL MOORE [L. S.]
CHARLES H. MOORE. [L. S.]
DAVID FREEMAN. [L. S.]

Sealed and delivered in the presence of—

C. L. HARWOOD.
CHAS. W. OGDEN.

Acknowledged before me July 2, 1891, by Charles H. Moore and David Freeman.

[SEAL.] C. DART,
Com'r U. S. Cir. Ct. Court, E. D. T.

THE STATE OF TEXAS, }
County of Brazos. }

Before me, Thomas Haynes, a notary public in and for said county and State, on this day personally appeared G. Bedell Moore, known to me to be the person whose name is subscribed to the instrument on the reverse hereof and acknowledged to me that he executed the same for the purposes and considerations therein expressed, both for himself and for Lutcher & Moore.

Given under my hand and seal of office this 26th day of June, A. D. 1891.

[SEAL.] THOMAS HAYNES,
Notary Public, B. C., Texas.

122 UNITED STATES OF AMERICA, }
Eastern District of Texas, at Galveston, } ss.

Personally appeared Charles H. Moore and David Freeman, who, being duly sworn, each for himself, deposes and says that he is the surety on the within bond; that he resides at Galveston, Galveston county, Texas, and is worth the full sum of five thousand dollars over and above all his debts and liabilities and property exempt from execution.

CHARLES H. MOORE.
DAVID FREEMAN.

Subscribed and sworn to before me this 2d day of July, 1891.

C. DART,

[SEAL.] *Commissioner U. S. Circuit Court, Eastern District of Texas.*

Approved by me this 10th day of July, 1891, at chambers, Washington, D. C.

L. Q. C. LAMAR,
Circuit Justice.

The foregoing bond endorsed as follows: No. 1444. United States circuit court, eastern district of Texas, at Galveston. United States *vs.* Lutcher & Moore. Bond for writ of error. Filed July 16th, 1891. C. Dart, clerk.

123 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Texas, at Galveston, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you or some of you, between United States, plaintiffs, and the firm of Lutcher & Moore, consisting of Henry J. Lutcher & G. Bedell Moore, defendants, a manifest error hath happened, to the great damage of the said firm of Lutcher & Moore, consisting of the said Henry J. Lutcher and G. Bedell Moore, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on a day not exceeding 30 days from the day of signing the citation in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
124 to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

C. DART,

[SEAL.] *Clerk of the United States Circuit Court for the Eastern District of Texas, at Galveston.*

Allowed by— ——.

Indorsements: United States circuit court 5th circuit & east. dist. of Texas, at Galveston. No. 1444. United States *versus* Lutcher & Moore. Writ of error. Filed July 16th, 1891. C. Dart, clerk.

125 *Writ of Error (Duplicate). Deposited in Clerk's Office for Deft in Error July* 16, 1891.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Texas, at Galveston, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between United States, plaintiffs, and the firm of Lutcher & Moore, consisting of Henry J. Lutcher & G. Bedell Moore, defendants, a manifest error hath happened, to the great damage of the said firm of Lutcher & Moore, consisting of the said Henry J. Lutcher and G. Bedell Moore, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on a day not exceeding 30 days from the day of signing the citation, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to
126 be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

[SEAL.] C. DART,
Clerk of the United States Circuit Court for the Eastern District of Texas, at Galveston.

Allowed by—

Indorsements: United States circuit court, 5th circuit & east. dist. of Texas, at Galveston. No. 1444. United States *versus* Lutcher & Moore. Duplicate writ of error. Deposited in clerk's office for defendant in error July 16, 1891. C. Dart, clerk.

127 *Citation on Writ of Error to Supreme Court of the United States. Issued July 10, 1891.*

The United States of America to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, not exceeding thirty days from and after the citation shall be signed, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Galveston, Texas, wherein Henry J. Lutcher and G. Bedell Moore, composing the firm of Lutcher & Moore, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand eight hundred and ninety-one.

LUCIUS Q. C. LAMAR,
[SEAL.] *Circuit Justice, &c.*

On this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared John M. Whelan, deputy U. S. marshal, E. D. T., before me, the subscriber, C. Dart, clerk U. S. circuit court, eastern district of Texas, and makes
128 oath that he delivered a true copy of the within citation to R. E. Hannay, United States attorney for the eastern district of Texas, at Paris, Texas, in my district, in person, on the 17th day of July, 1891.

J. J. DICKERSON, *U. S. M.*,
By JOHN M. WHELAN, *Deputy.*

Sworn to and subscribed the 20th day of July, 1891, at Galveston, Texas.

C. DART, *Clerk*,
[SEAL.] By W. L. HANSCOM, *Deputy.*

Indorsements: C. L. No. 1444. The United States *vs.* Lutcher & Moore. Citation on writ of error to Supreme Court of the U. S. Returned and filed July 20, 1891. C. Dart, clerk, by W. L. Hanscom, deputy.

129 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of all proceedings in cause No. 1444, on

the law docket of said court, entitled United States *vs.* Lutcher & Moore, as the same now appears in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 22nd day of July, A. D. 1891.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, E. D. T.
By W. L. HANSCOM, *Deputy.*

[Endorsed:] No. 1441. United States circuit court, eastern district of Texas. The United States *vs.* Lutcher & Moore. Copy of the record and of all proceedings.

130 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Texas, at Galveston, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between United States, plaintiff, and the firm of Lutcher & Moore, consisting of Henry J. Lutcher & G. Bedell Moore, defendants, a manifest error hath happened, to the great damage of the said firm of Lutcher & Moore, consisting of the said Henry J. Lutcher and G. Bedell Moore, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on a day not exceeding 30 days from the day of signing the citation, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, Eastern District of Texas.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 2d day of July, in the year of our Lord one thousand eight hundred and ninety-one.

C. DART,
Clerk of the United States Circuit Court for the Eastern District of Texas, at Galveston.

Allowed by——

[Endorsed:] United States circuit court, 5th circ. & east. dist. of Texas, at Galveston. No. 1441. United States *versus* Lutcher & Moore. Writ of error. Filed July 16, 1891. C. Dart, clerk.

131 The United States of America to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, not exceeding thirty days from and after the citation shall be signed, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Galveston, Texas, wherein Henry J. Lutcher and G. Bedell Moore, composing the firm of Lutcher & Moore, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal United States Circuit Court, Eastern District of Texas.]

LUCIUS Q. C. LAMAR,
Circuit Justice, &c.

132 [Endorsed:] C. L. No. 1444. The United States *vs.* Lutcher & Moore. Citation on writ of error to Supreme Court of the U. S. Returned and filed July 20, 1891. C. Dart, clerk, by W. L. Hanscom, deputy.

On this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared John M. Whelan, deputy U. S. marshal, E. D. T., before me, the subscriber, C. Dart, clerk U. S. circuit court, eastern district of Texas, and makes oath that he delivered a true copy of the within citation to R. E. Hannay, United States attorney, for the eastern district of Texas, at Paris, Texas, in my district, in person, on the 17th day of July, 1891.

J. J. DICKERSON, *U. S. M.*,
By JOHN M. WHELAN, *Deputy.*

Sworn to and subscribed the 20th day of July, 1891, at Galveston, Texas.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART, *Clerk*,
By W. L. HANSCOM, *Deputy.*

Endorsed on cover: Case No. 14,809. E. Texas C. C. U. S. No. 271. Henry J. Lutcher and G. Bedell Moore, composing the firm of Lutcher & Moore, plaintiffs in error, *vs.* The United States. Filed August 18, 1891.

Office Supreme Court, U. S.
FILED.
MAR 21 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1894.

LUTCHER & MOORE, *Plaintiffs in Error,*
vs.
THE UNITED STATES, *Defendant in Error.*
} In Error. No. 271.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

J. L. BRADFORD,
For Plffs. in Error.

BYRON S. ADAMS, PRINTER.

In the Supreme Court of the United States.

October Term, 1894.

LUTCHER & MOORE, *Plaintiffs in Error*,
vs.
THE UNITED STATES, *Defendant in Error*. } In Error. No. 271.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This was a suit at law brought by the United States in the Circuit Court for the Eastern District of Texas against the firm of Lutcher & Moore of the same district, doing a milling and manufacturing business at Orange, Texas, to recover damages for pine timber unlawfully taken from the public lands in Louisiana and sold to said firm. Suit was filed March 11, 1887, for an amount sufficient to give the Court jurisdiction under Section 1 of the judiciary act of March 3, 1875 (18th Stats., 470), as amended by Section 1 of the act of March 3, 1887, (24 Stats., 552). On the trial various bills of exception were taken by the defendants to the ruling of the Court admitting and rejecting evidence and refusing charges asked. There was a verdict for the United States on which judgment was rendered and signed March 11, 1891, for $4,158 (Rec., p. 38). To reverse this judgment a writ of error was taken, with supersedeas bond, returnable on the third Tuesday in June next following, *to the Circuit Court of Appeals* for the Fifth Circuit, under Section 6 of the act creating circuit courts of appeal, approved March 3, 1891 (138 U. S. Repts., 709). The writ bore teste and was

lodged March 27, 1891, was allowed, and bond approved April 3d (Rec., p. 42), and citation served April 24th (Rec., p. 49).

The Court of Appeals for the Fifth Circuit was organized at New Orleans June 16, 1891 (being the third Tuesday, as required by joint resolution of March 3, 1891, 138 U. S., 715), and on the following day, June 17th, Lutcher & Moore offered, through their counsel, to file the transcript and docket the cause in that Court.

The clerk asked that the matter should be referred to the Court, and that he might have its order for filing and docketing. The case was stated orally at the bar of the Court by counsel (the United States attorney representing the United States), and leave asked to file the transcript and docket the case. But after full argument on both sides and consultation among the judges on the bench, it was unanimously held that the Court of Appeals had no jurisdiction to review the judgment of the Circuit Court in the case, but that the right of review was in the Supreme Court under Section 6 of the Court of Appeals act (Rec., p. 52; and see affidavit of counsel, and certified copy of order of Court filed with this brief). The Court, therefore, refused to allow the cause to be docketed and transcript filed, and informed counsel, through associate Justice Lamar, of the Supreme Court, presiding, that a writ of error, with supersedeas, would be allowed direct to the Supreme Court under Section 6 of the aforesaid act. Accordingly a petition (Rec., p. 52), praying for such process was presented to the said justice at New Orleans, La., June 30, 1891, and allowed the same day (Rec., p. 53). This petition and the order allowing the writ and supersedeas were filed in the Circuit Court July 2, 1891, but the bond was not approved and citation issued until July 10, 1891, when they were so approved and issued by Justice Lamar at Chambers in Washington City (Rec., pp. 55 and 57). The writ of error bore teste July 2d, but was not lodged until July 16th (Rec., p. 56), and citation was served July 17th (Rec., p. 57). The transcript was filed in the Supreme Court August 18, 1891. In addition to the record, counsel have prepared to accompany this brief an *ex parte* affidavit showing the facts attending the offer to docket the case and file the record in the Circuit Court of Appeals, as also a certified copy of the order of that Court of June 17, 1891, refusing the same. The peculiar and exceptional nature

of the case, he hopes, will justify this course. For a like reason the brief omits the specification of errors relied on, as required by Rule 21, clause 2: Because from the view counsel takes this court can make no order in the case affirming, reversing or modifying the judgment of the Circuit Court.

ARGUMENT.

The case is truly *sui-generis*. The judgment of the Circuit Court was lawfully and regularly removed by writ of error for review by the Circuit Court of Appeals, under Section 6 of the act of March 3, 1891. The jurisdiction of that Court to review the judgment seems too plain for argument. Evidently the case is not embraced in any one of the six classes in which, by Section 5, the right of review is to be sought in the Supreme Court by writ of error or appeal. As a consequence the review must be by the Court of Appeals under the 6th Section "*unless otherwise provided by law.*" In Lau Ow. Bew. *vs.* U. S. (144 U. S., 56), it was said: "The words '*unless otherwise provided by law,*' were manifestly inserted out of abundant caution in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause." The Circuit Court of Appeals entertained a different view of these words. They thought they had a necessary relation to the closing language of Section 6, allowing, as a matter of right, appeal or error from final judgments and decrees involving over $1,000 in value, and that the judgments and decrees here referred to were those of the *circuit and district courts*, and not of the courts of appeal. And as the judgment in question was for a sum exceeding $1,000, and, *as a judgment of a circuit court*, had not been made final by any part of Section 6, therefore it was such a judgment as could only be taken to the Supreme Court under that language, direct from the Circuit Court, and not to the Court of Appeals. In the argument the Court cited Rule 36 of this Court (then recently promulgated, 136 U. S.,

706) to show that this Court clearly thought Section 6 contemplated that in *some* cases a writ of error could go direct from the Supreme Court to a Circuit or District Court.

It was contended that it must be so or else the rule would not have provided a mode of procedure for such writs. While this did seem to be the letter of the rule it was argued, in reply, by counsel for the plaintiffs in error, that the spirit of it should prevail, and that that must be harmonized with the other provisions of the law. It was argued that if the closing language of Section 6 did not refer to the judgments and decrees of the Court of Appeals, then there was no other part of the act giving, as a matter of right, an appeal or writ of error from such judgments and decrees; whereas Section 10, in the clearest terms, laid down the mode in which, after such judgments and decrees had been brought up by appeal or error, the Court should exercise its power of review.

In fine, a writ of right, clearly allowed by Section 6, under which the judgment complained of was fairly brought for review and correction to a court competent to afford relief, was nullified by that court, and under what seems now the plainest error of law, the parties aggrieved were sent here to a court having no jurisdiction to review such a judgment under the new law, and which had none under the old law. This Court has no jurisdiction to review the judgment of the Circuit Court under the old law, because the writ of error being brought by defendants, the matter in controversy, as to them, that is, the judgment, was less than $5,000. (Phillips Prac., 77, 2d Ed.)

Under Section 3 of the Act of February 16, 1875 (18 Stats., 315), repealed by Section 14 of the Act of March 3, 1891, this was fatal to the right of review.

It has no jurisdiction under the Court of Appeals act for the reasons we have stated. The review being sought by writ of error, Section 14, by the repeal of all prior laws allowing *such* mode of review inconsistent with the new mode of review by writ of error provided for in Sections 5 and 6, it results that unless the writ in this case will lie under one or the other of those sections it will not lie at all. Under Section 5 it can't lie, as the case is plainly not within any of the six clases described in it, and even the Court of

Appeals did not contend it was. Then, under Section 6, it can't lie, unless the words "unless otherwise provided by law" have the relation to the last part of the section the Court of Appeals thought they had. But the decision in Lau. Ow. Bew. *vs.* U. S. (144 U. S., 56), shows they have no such relation; that they were not introduced to amplify the field of appellate jurisdiction of the Supreme Court, but to conserve, as against implied contemporaneous or future impairment, that vested by the new law in the circuit courts of appeal.

Recognizing, therefore, the inevitable, and protesting that we were sent here and did not come, the only question of any value to us now is, How are we to get back to the court where we belong and where in law, if not in fact, the writ of error is yet pending? (Rec., pp. 47-51.)

The United States ask dismissal on two grounds:

1st. Because the writ was too late under joint resolution of March 3, 1891 (138 U. S., 715), and under authority of Cincinnati, &c., *vs.* Grand Rapids Deposit Co. (146 U. S., 54).

2d. Because the Court has no appellate jurisdiction under the new law and had none under the old to review the judgment of the Circuit Court on a writ of error sued out by the defendants, Lutcher & Moore.

If there must be dismissal, we ask that it be on the second, and not on the first, ground.

And for these reasons:

The joint resolution seems to have no application to the facts of this peculiar case.

Its purpose was to allow the appellate jurisdiction of the Supreme Court and Circuit Courts to flow on unaffected by anything in the new law, if such jurisdiction had been invoked in the modes provided by the old law prior to July 1, 1891.

The proviso is that the new law shall not in such cases "*impair the jurisdiction*" of the Supreme or Circuit Courts. But in this case, even had the writ been taken and perfected before July 1st, no appellate jurisdiction would have attached for the reasons we have seen. There would have been none to be impaired, because under the old law none had been conferred. Hence this

resolution seems to have no application. In the absence of it, and in the absence of the act itself, no matter when the writ had been perfected, this Court would have had no appellate jurisdiction over the judgment. Besides, if this were otherwise the delay in perfecting the writ was imputable not to the plaintiffs in error. They have shown the utmost diligence in suing out and perfecting both the writ to the Circuit Court of Appeals and to this Court.

If the dismissal be on the second ground the court may in some sort retrieve the wrong done us, which on a dismissal on the first ground it could not do.

A dismissal on the second ground will advise the Court of Appeals that its construction of Section 6 of the Act of March 3, 1891, was erroneous, and it cannot be assumed that thereafter that Court will persist in its refusal to docket and proceed with the case, and thus drive plaintiffs in error to *mandamus*. Something of the kind was done by the court in the peculiar case of *The Alicia* (7 Wal., 571), which is something analogous to the case at bar.

Under its authority, or rather precedent, we ask that if this case be dismissed it be for the reasons stated above. And as, where jurisdiction is entirely wanting in *this* Court, no other order can be made but one of dismissal, instead of asking a remand to the Court of Appeals, or any order on the Circuit Court, we ask that the opinion be certified to the Court of Appeals for its information. That was done in *The Alicia*. On January 9, 1863, in a prize case, a decree of condemnation was entered in the District Court, and in the same month removed by appeal to the Circuit Court, where it was pending when, by Section 13 of the Act of June 30, 1864 (13 Stats., 311), it was authorized by agreement of the parties to be "*transferred*" to the Supreme Court. Under this section, on May 18, 1867, an order was made in the Circuit Court *transferring* the case, no judgment, decree, or other order having been made in that Court, and the decree of the District Court having itself been vacated by the appeal to the Circuit Court. The case came up in the Supreme Court on the motion of the United States to docket and dismiss under the first clause of the 9th Rule. It was held that the Court acquired no appellate jurisdiction under the "transfer," and that the cause was still pending for judgment in the Cir-

cuit Court. The motion to docket and dismiss was therefore denied. But the Court said its opinion in the case might be certified to that court for its information. If in the case at bar plaintiffs in error had failed to docket and file the transcript in time, and the United States had, under Rule 9, moved to docket and dismiss, a precisely parallel case would have arisen. Instead of doing that *in limine*, they do the same thing substantially on the merits. In *The Alicia* the Court refused to dismiss because there was no judgment of the Circuit Court to be reviewed and no jurisdiction was acquired under the order of transfer.

In the case at bar there is a judgment of the Circuit Court, but that judgment is pending for review in the Court of Appeals, and if it were otherwise this Court acquired no jurisdiction to review it under the writ of error for the reasons we have seen. In one case the review was sought by a "transfer" unknown to the law, and no jurisdiction attached. In the other the review is sought by a writ of error which is unauthorized by law, is void, and under which jurisdiction no more attaches them under the transfer. How can there be a judgment of dismissal, therefore, in the one case more than in the other? All the Court can do, it would seem, is to follow the precedent in *The Alicia* and render such an opinion as, on being certified, will inform the Court of Appeals as to its duty to render judgment on the writ of error pending before it.

In *The Lucy* (8 Wall., 308) there was a motion to dismiss for want of jurisdiction and also for failure to file the record in time; the dismissal was on the former ground. The appeal was from a district court which, before July 15, 1862, had circuit court powers. A law of that date created a separate circuit court, and gave it appellate jurisdiction over the district court. The latter court rendered the decree August 4, 1862, and on the 15th allowed the appeal to the Supreme Court. It was held that the appeal was a nullity because the power to review was in the Circuit Court, and not in the Supreme Court. A writ of error duly allowed and perfected is a writ of right. Section 6 of the Court of Appeals act treats it as such, and distinguishes between it as matter of right and the other modes of review provided for as matters *ex gratia*. Under this section plaintiffs in error observed due diligence and perfected their

writ, whereby the judgment of the Circuit Court was removed for review to the only court competent to review it. In law, it is pending there now, but in fact it is here. In this the record, the extract from the minutes of the Court of Appeals, and the affidavit of counsel, show we are not chargeable with laches, mistake, or failure to comply with the requirements of law. It is unnecessary to speak plainer. If the case must be dismissed we ask under the peculiar hardships of it that it be for want of jurisdiction to review the judgment under Section 6 of the Court of Appeals act and that leave be granted to certify the opinion, as in *The Alicia*, to the Court of Appeals for its information.

Respectfully submitted,

J. L. BRADFORD,
For Plffs. in Error.

NEW ORLEANS, LA., *March 10, 1895.*

Office Supreme Court U. S.
FILED.
MAR 25 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

HENRY J. LUTCHER AND G. BEDELL MOORE, composing the firm of Lutcher & Moore, plaintiffs in error,
v.
THE UNITED STATES.
No. 271.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

HENRY J. LUTCHER AND G. BEDELL MOORE, composing the firm of Lutcher & Moore, plaintiffs in error,
v.
THE UNITED STATES.
No. 271.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

THE CASE.

The plaintiffs in error were convicted on March 11, 1891, and judgment recovered against them by the United States for the sum of $4,158, with interest thereon at the rate of 8 per cent per annum from the 11th day of March, 1891, until paid, and for costs of suit in the circuit court of the United States for the eastern district of Texas.

This judgment was in a civil proceeding, by petition filed March 11, 1887, charging the defendants therein, who are plaintiffs in error here, with cutting, carrying away, and converting to their own use certain timber, the property of the United States.

On March 27, 1891, plaintiffs in error, by their attorneys, filed their petition for a writ of error, to have the said judgment of the circuit court reviewed by the circuit court of appeals for the fifth circuit.

The writ of error was allowed April 3, 1891, and appears to have been regularly executed on the 24th of April, 1891. Whatever proceedings were had in the circuit court of appeals on this writ of error do not appear.

On July 2, 1891, a petition by plaintiffs in error, addressed to the Hon. L. Q. C. Lamar, associate justice of the Supreme Court of the United States, with the order of the justice for the writ of error indorsed thereon, was filed. This petition recites the removal of the cause, by writ of error, to the circuit court of appeals, and avers:

> That on Wednesday, the 17th day of June, 1891, after the said circuit court of appeals for the fifth circuit had organized, your petitioners offered in said court to docket said cause and to file the transcript of the record thereof. But the court, on considering the objections by the defendants in error, refused to allow the same on the ground that under the sixth section of said act of March 3, 1891, these petitioners should have taken said cause for review to the Supreme Court of the United States, and not to the said circuit court of appeals.

On July 2, 1891, the day the petition was filed, Mr. Justice Lamar directed the issuance of the writ of error to operate as a supersedeas upon the plaintiffs in error giving bond.

So it appears from the record here that the writ of error issued on July 2, 1891 (Rec., 55); that the bond was filed

July 16, 1891 (Rec., 52 and 53); that the citation issued on July 10, 1891 (Rec., 57); and the transcript of the record was filed in this court on August 19, 1891.

ARGUMENT.

In *Cincinnati Safe and Lock Company* v. *Grand Rapids Safety Deposit Company* (146 U. S., 54) the writ of error was allowed June 19, 1891, with stay of execution upon the filing of a supersedeas bond; and such bond was filed and approved June 20, 1891.

The petition for the allowance of the writ of error and an assignment of errors were filed in the clerk's office of the circuit court July 3, 1891, and the writ of error bears test and was filed in the office on that day.

The motion to dismiss for want of jurisdiction on the ground that the writ of error was not sued out before July 4, 1891, was sustained by this court upon the authority of the cases cited by the Chief Justice, who delivered the opinion of the court.

The case is here on writ of error to the circuit court of the United States in and for the fifth circuit, to review the judgment of that court.

In the brief of counsel for plaintiffs in error it is insisted, page 4, that—

> This court has no jurisdiction to review the judgment of the circuit court under the old law because, the writ of error being brought by defendants, the matter in controversy as to them, that is, the judgment, was less than $5,000.
>
> It has no jurisdiction under the court of appeals act for the reasons we have stated.

And on page 5:

> Recognizing, therefore, the inevitable, and protesting that we were sent here and did not come, the only question of any value to us now is: How are we to get back to the court where we belong, and where, in law, if not in fact, the writ of error is yet pending.

It would seem from this brief, as well as from the record, that the plaintiffs in error has two distinct grievances, of which his counsel complain, to wit:

(1) The judgment of the circuit court, resulting, as he complains, from erroneous rulings during the trial; and

(2) The refusal of the circuit court of appeals to entertain the cause on the writ of error allowed April 3, 1891 (p. 51).

The plaintiffs in error are here on their own petition, complaining of the errors committed by the circuit court.

They claim to be, also at the same time, in the circuit court of appeals on a writ of error, complaining of the same errors in the judgment of the circuit court. They can not have two appeals from the same judgment pending at the same time in two appellate Federal courts.

If, as they contend, the circuit court of appeals, and not the Supreme Court of the United States, is the one in which they are entitled under the law to have their wrongs redressed, their appropriate remedy in this court would seem to be by some writ upon which the refusal of the circuit court of appeals to grant the proper relief could be corrected.

No order of the circuit court of appeals, refusing to entertain the case on writ of error, appears in this record,

although it is stated in the petition of plaintiffs in error, page 52 of the record:

> Your petitioners offered in said court to docket said cause and to file the transcript of the record thereof, but the court, on considering the objections by the defendant in error, refused to allow the same on the ground that under the sixth section of the said act of March 3, 1891, these petitioners should have taken said cause for review to the Supreme Court of the United States, and not to the said circuit court of appeals.

Now, if this ruling of the circuit court of appeals, with the ground upon which it placed it, had been brought before this court in a bill of exceptions, it would have presented a case expressly provided for in section 6 of the act of March 3, 1891, defining the classes of judgments of the circuit court of appeals, which shall be final, it being apparent that the jurisdiction of that court in this case did not depend upon any of the conditions prescribed in that section, and hence did not fall within the class of final judgments.

We think the writ of error applied for in the petition on page 52, and allowed by Justice Lamar, might then have been to the circuit court of appeals, to have reviewed its judgment in refusing to take jurisdiction in the case brought before it on writ of error to the judgment of the circuit court.

But, if we are mistaken in this view, then the case presented is simply this: The defendants against whom judgment had gone in the circuit court, desired to have that judgment reviewed by the proper appellate court.

Assuming it to be true, as they insist, that the circuit court of appeals was the proper appellate court to review that judgment, that court, upon due application to it regularly made, declines to entertain the writ of error. The language of the statute is mandatory. It provides:

> That the circuit court of appeals established by this act *shall* exercise appellate jurisdiction to review, by appeal or writ of error, final decision in the district court and the existing circuit courts, etc.

Now, here, no *discretionary* power is vested in the circuit court of appeals. It is not a matter resting in their judgment to determine whether it shall exercise the jurisdiction or not. It simply refuses to do so; and does not express this refusal in any written order or judgment appearing on its records.

How shall it be compelled to exercise the power and duty which the statute so peremptorily imposes upon it?

In *Ex parte Cutting* (94 U. S., 14) there was a petition for a writ of mandamus to the circuit court of the United States for the eastern district of Missouri, asking that a writ of mandamus may issue from this court to the judges of the circuit court—

> commanding them, or one of them, to grant your petitioners an appeal to this court from the decrees of that court in said cause, and to accept bond to act as a supersedeas; and that such appeal be allowed as of the date when said application was made originally in said court, or when it was rejected, as this court shall order.

The application was denied in that case, but only because the petitioner was not an original party to the suit and that he had not acted or been treated as a party, and—

> That no one of these petitioners has ever made application to the circuit court, or either of the judges, for the allowance of an appeal in his favor, as a party to the suit.

In *ex parte Jordan* (94 U. S., 248) an application for a mandamus was made to the circuit court of the United States for the southern district of New York, to compel an allowance of an appeal from its decision. There, too, the objection was made that the petitioners were not original parties to the suit. But this court held that they—

> were defendants in the suit when the final decree was rendered. They were directly interested in what was then decided.

The court further, speaking through Chief Justice Waite, and referring to the language of the statute providing for appeals, said:

> The language of the statute is "*shall* be allowed," which means *must* be allowed when asked for by one who stands in such relation to the cause that he can demand it. The question upon such an application is not what will be gained by an appeal, but whether the party asking it can appeal at all.

And the petition in this case was allowed.

In *Ex parte Railroad Company* (95 U. S., 221) the petition was for a writ of mandamus to the circuit court of the United States for the middle district of Alabama. The petition was resisted on the ground that the peti-

tioner could not appeal because its rights were not injuriously affected by the decree. But the writ was issued by this court, directing the circuit judge to allow the appeal prayed for as of the date of the final decree.

The plaintiffs in error appear, then, to be in this predicament. If the judgment of the circuit court, of which they complain, was erroneous, and if the proper appellate tribunal for the correction of the error was the circuit court of appeals, then plaintiffs in error have failed to employ the proper remedies to require that court to exercise its appellate jurisdiction, those remedies being either an appeal to this court from the judgment of the circuit court of appeals in refusing to exercise appellate jurisdiction, or else by mandamus to compel such exercise. If, on the other hand, the Supreme Court of the United States was the proper tribunal to correct the errors of the circuit court, then plaintiffs in error are too late in taking out their writ of error. (146 U. S., 54; 153 U. S., 361.) The case, we submit, must be dismissed without consideration of the questions presented on the merits.

THE MERITS.

No assignment of error appears in the record, but the errors complained of are presented in three bills of exception, which will be considered in the order in which they appear in the record.

1. The first bill of exceptions (p. 42) is to the action of the court in overruling the objection made by plaintiffs in error to certain depositions offered to be read in evidence on behalf of the United States; and also to the motion of

plaintiffs in error to strike out, exclude, and suppress said depositions on the ground that the depositions did not appear on their face to have been regularly taken, or to have been taken before any officer authorized to take them and were not properly authenticated and were altogether informal and irregular.

The objection and motion were overruled by the court on the ground set forth in the record (p. 43). (1) That the motion to strike out and the objection were not made until after the parties had announced themselves ready for trial, and had actually entered upon the trial of the cause; (2) because said depositions had been on file in the said cause since April 1, 1890, one day before an agreement in writing between the parties, as to such depositions, had been signed and filed; (3) and because of the agreement between the parties of April 2, 1890, page 30.

The depositions referred to with the certificate of the notary public by whom they were taken appear, pages 20 to 30, and were filed April 1, 1890.

The agreement referred to by the court in its ruling upon the motion will be found on page 30, and is as follows:

UNITED STATES)
v.)
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It is agreed in the cases of *The United States* v. *Lutcher and Moore* that the same will be continued to the next term in the condition in which they now stand, and that neither party at the trial of said causes will take any objection to the form of taking

testimony in any of said cases by the other *de bene esse* under sections 863 and 864, U. S. Revised Statutes. This applies to the testimony already taken only.

April 2, 1890.

MONTFORT S. JONES,
Spl. Asst. U. S. Atty.
JOSEPH H. WILSON,
U. S. Atty. Ea. Dist., Texas.
J. L. BRADFORD,
Atty. for L. and M.
W. B. DENSON,
Atty. for L. and M.

From which it would appear that the effect, if not the purpose, of the motion to exclude these depositions would have been to violate the spirit and letter of the agreement between counsel, and to operate a surprise upon counsel for the plaintiff at a stage of the case at which he would be unable to obtain a remedy.

Counsel for plaintiffs in error were authorized, under their general power as attorneys, to enter into the agreement for their client, and their admission is binding upon him. (1 Greenlf. Ev., 15 ed., sec. 186.)

2. The second bill of exceptions, page 45, was to the refusal of the court to admit in evidence before the jury certain patents issued by the United States on the 20th of June, 1885, to Ellen C. Lovett, for part of the land on and from which the timber was alleged to have been cut and removed.

And for refusing to charge the jury that if they found from the evidence that the Government had sold said land to Ellen C. Lovett and issued to her patents therefor, that—

> they will find for the defendants for so much timber as they find to have been cut upon and removed from the land so sold, whether or not the evidence shows that all, or any of it, came into the possession of said defendants.

It will be observed that the trespass charged in the petition was committed during the period from January, 1881, to August, 1882, while the patents to Ellen C. Lovett were alleged to have been issued to her on the 20th of June, 1885.

The proposition insisted upon, both in the offer of the patents in evidence and in the instruction to the jury asked for, is that a sale of land by the Government extinguishes its right of action for damages against one who had committed a trespass on the land at a date prior to the date of the sale.

The mere statement of the proposition would seem to involve its refutation.

A house worth $50,000 is erected upon a lot of ground worth only $1,000. One recklessly and willfully utterly destroys the house by fire or otherwise. The owner then sells the vacant lot to a third person for $1,000. The proposition here is, that his right of action against the person who has destroyed his house is extinguished by the sale of the lot. Whether it is claimed to have been transferred by such sale to the grantee of the lot, or extinguished

altogether, does not appear in the bill of exceptions. But the one proposition is hardly less unreasonable than the other.

In *Schuylkill* v. *Decker* (2 Watts, 344) a writ of *ad quod damnum* was granted to ascertain the damage to the land of Decker by the location of a canal thereon. Pending the writ Decker conveyed the land to Urich. On a rule to show cause why Urich should not be made a party defendant to the proceeding. Gibson, C. J., said:

> It is a decisive objection that Urich has not title to the damages, which being in compensation of an injury, in the nature of a trespass, could not pass by a conveyance of the land.

In *Moore* v. *Marsh* (7 Wall., 515):

> The only question in the case is whether the assignment by the plaintiff to a third person of an undivided half of the right, title, and interest secured to him by his letters patent, subsequent to the alleged infringement, but before the commencement of the suit, is a bar to his claim to recover damages for such infringement.

The court in denying the claim of the assignee to any right of action for damages on account of the infringement said, page 522:

> The reason for the rule is that the assignee, or grantee, is not interested in the damages for any infringement committed before the sale and transfer of the patent.

3. The third bill of exceptions, page 46, is to the refusal of the court to grant four instructions, which are therein set out.

The first and second instructions are predicated upon the idea that one can not be held liable in damages for an injury which he does to another unless such injury was done in "bad faith."

It is undoubtedly true that one can not be held liable *criminally* for an act done by him unless a criminal intent be shown. But it is equally true that a civil liability will be imposed on one who, through negligence or want of care, inflicts injury upon the person or property of another. And also that one may be held liable to another for the value of the property of such other as he may have appropriated and converted to his own use, and this in the absence of *scienter* or bad faith.

One who buys in good faith in open market a horse which the seller has stolen may be held liable to the true owner in trover and conversion for the value of such horse if, since his purchase, he has sold it and received the purchase money therefor.

The charge in the petition here is that Knight and Lovett entered upon the premises of the plaintiff, and cut the timber, and carried it away. That it was subsequently taken possession of by Lutcher & Moore, the defendants in this action, and by them converted into lumber and sold, and the proceeds converted by them to their own use.

This would have subjected the defendants to the common law action of trover. But, under the statutory forms of pleading in Texas, they were proceeded against by petition, in which it is alleged, page 3:

> Plaintiff alleges that if said defendants, at the time of the conversion of said trees into lumber by them, did not have notice that said trees were the property

> of plaintiffs, then, and in that case, they are liable and bound to pay to plaintiff the value of said timber in logs, * * * aggregating the value of $7,369.42, for which plaintiff sues in the alternative, and for which he prays judgment, and for costs, and interest, and general relief.

In *Woodenware Company* v. *The United States* (106 U. S., 435) the defendant was sued in trover for the value of certain timber bought by him from one who had knowingly and wrongfully cut and removed it from a Government reservation. This court said:

> The question to be decided is, whether the defendant, who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor would if he had been sued.
>
> It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest that title, nor the right of possession. It is plain that by purchase from the wrongdoer, defendant did not acquire any better title to the property than his vendor had.

The third instruction asked for was as follows:

> That the defendants are not required to show that Knight and Lovett got the timber from their own or other lands than that charged in the petition. But it is the duty of the plaintiff to show that the timber charged to have been received by the defendants, Lutcher & Moore, came from the particular lands charged in plaintiffs' petition.

The objection to this instruction was that it introduced a new and distinct issue to be tried by the jury, involving the conduct of Knight and Lovett, who are not parties to this suit. That objection was avoided by the instruction given by the court to the jury, in lieu of the one asked for by defendants, and which was as follows:

> The jury were instructed that no verdict could be found for the plaintiff unless the evidence showed to their satisfaction, to a reasonable certainty, that the timber was cut and removed from the lands described in the petition, and between the dates alleged in the petition, and that Lutcher & Moore received, paid for, and converted the same to their own use and benefit.

The instruction as given embraces also, substantially, the fourth instruction asked for by the defendants and refused by the court.

HOLMES CONRAD,
Solicitor-General.